

No. 12259

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United States  
Court of Appeals  
For the Ninth Circuit.

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SEATTLE HARDWARE COMPANY,  
Appellant,  
vs.

CLARK SQUIRE, Collector of Internal Revenue,  
Appellee.

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Transcript of Record

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Upon Appeal from the United States District Court for the  
Western District of Washington, Southern Division

FILED  
AUG - 5 1949

PAUL P. O'BRIEN,  
O'Brien



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Transcript of Record

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Upon Appeal from the United States District Court for the  
Western District of Washington, Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

JONES & BRONSON,

A. R. KEHOE,

Attorneys at Law,  
Colman Building,  
Seattle 4, Washington,

For Plaintiff.

J. CHARLES DENNIS,

United States Attorney,  
Tacoma, Washington.

THOMAS R. WINTER,

Special Assistant to the Chief Counsel,  
Bureau of Internal Revenue,  
713 Smith Tower,  
Seattle, Washington,

For Defendant.

In the District Court of the United States for the  
Western District of Washington, Southern Di-  
vision

No. 1059

SEATTLE HARDWARE COMPANY,

Plaintiff,

vs.

CLARK SQUIRE, Collector of Internal Revenue,  
Defendant.

### COMPLAINT

Comes Now the plaintiff and complains of the defendant and for cause of complaint, alleges as follows:

#### I.

That plaintiff now is, and at all times herein mentioned has been, a corporation duly organized and existing under the laws of the State of Washington and lawfully authorized to maintain this action.

#### II.

That the defendant now is and since March 16, 1941, has been the duly appointed, qualified and acting Collector of Internal Revenue for the collection district of Washington, having his office and residing at the City of Tacoma in the jurisdiction of this court; that the acts done by the defendant as herein alleged were done by him in his representative capacity and under and pursuant to the direction of the Commissioner of Internal Revenue of the United States.

## III.

That plaintiff keeps its accounts and makes its Federal Income Tax returns upon an accrual basis and upon a fiscal year basis commencing December 1 and ending November 30.

## IV.

That for the fiscal year ending November 30, 1941, the plaintiff duly made and filed its Federal Income, Declared Value Excess Profits Tax, and Excess Profits Tax Returns under which it became liable to pay as income and excess profits taxes the sum of \$285,708.35, payment of which was made to the defendant in quarterly installments in 1942 and by additional assessment in the sum of \$26,220.07, which was paid to the defendant in January, 1945. Subsequently on August 27, 1945, the Commissioner of Internal Revenue determined an overassessment of \$646.87 and on June 10, 1946, determined an additional overassessment of \$5,057.43 and on June 19, 1946, the \$646.87 was refunded to plaintiff by defendant and on October 16, 1946, the \$5,057.43 was refunded to plaintiff by defendant. The net assessment against plaintiff after the adjustments indicated above for the fiscal year ending November 30, 1941, was therefore \$306,224.12. That for the fiscal year ending November 30, 1942, the plaintiff duly made and filed Federal Income and Excess Profits Tax Returns under which it became liable for such taxes in the sum of \$505,591.74, payment of which was made to the defendant in quarterly installments throughout 1943. Subsequently on a renegotiation for such year plaintiff was allowed a credit under

Section 3806 I.R.C. of \$48,082.02. Still later on June 10, 1946, the Commissioner determined a net overassessment of \$1,888.08. The net assessment against plaintiff after the adjustments indicated above for the fiscal year ending November 30, 1942, was \$455,621.64 and that was the amount used in determining the refundable amount in the claim for refund for such year referred to hereinafter. That for the fiscal year ending November 30, 1943, plaintiff duly made and filed its Federal Income and Excess Profits Tax Returns under which it became liable to pay such taxes in the sum of \$301,984.58, payment of which was made in quarterly installments during 1944. Subsequently on a renegotiation for such year plaintiff was allowed a credit under Section 3806 I.R.C. of \$72,000.00. Still later on June 10, 1946, the Commissioner determined a net overassessment of \$109.21.

The net assessment against plaintiff after the adjustments indicated above for the fiscal year ending November 30, 1943, was \$229,875.37 and that was the amount used in determining the refundable amount in the claim for refund for such year referred to hereinafter. That for the fiscal year ending November 30, 1944, the plaintiff duly made and filed its Federal Income and Excess Profits Tax Returns under which it became liable to pay as such taxes the sum of \$149,979.22, payment of which was made in quarterly installments in 1945. Subsequently on June 10, 1946, the Commissioner determined an overassessment of \$258.75. The net assessment against plaintiff after the adjustment in-

dicated above for the fiscal year ending November 30, 1944, was \$149,720.47 and that was the amount used in determining the refundable amount in the claim for refund for such year referred to herein-after. That for the fiscal year ending November 30, 1945, plaintiff duly made and filed its Federal Income and Excess Profits Tax Returns under which it became liable to pay as such taxes the sum of \$56,-664.08, payment of which was made in installments of one-quarter on February 15 and May 15 of 1946 and in one additional final installment of one-half on August 12, 1946.

## V.

That taxpayer in 1945 sold certain land together with buildings thereon, known as Lots One (1) and Two (2), Block 327, Seattle Tide Lands, upon which sale taxpayer suffered a loss. That taxpayer is entitled to an additional invested capital credit for said land and building and an increase in the basis used for determining loss on the sale thereof based upon the following facts: During the years 1901 through 1905 the taxpayer owned all of the stock of the Occident Trust Company, a Washington corporation. The Occident Trust Company acquired the above described land on October 1, 1903, and during the years 1904 and 1905 it erected a building on said land. On February 21, 1906, the Occident Trust Company transferred the land and building to plaintiff in complete liquidation of the stock of the Occident Trust Company which was owned by plaintiff and thereafter the Occident Trust Company was dissolved by operation of law. The fair market value

of said land was \$224,322 and the fair market value of the building was \$297,502.70, as of February 21, 1906. That these fair market values as of February 21, 1906, together constitute the cost to plaintiff of said land and buildings and constitute its basis for invested capital purposes and for the purpose of determining the loss on the sale of said property.

## VI.

That by reason of its failure to include the fair market value of said land and building as of February 21, 1906, in determining its basis with respect to gain or loss upon sale of said land and building and in determining its invested capital, plaintiff's income was overstated in its Income and Excess Profits Tax Returns for the years 1941 through 1945, inclusive, and Income and Excess Profits Taxes were overpaid by the plaintiff to the defendant during those years in the following amounts:

Year	Amount of Tax Overpaid
1941 .....	\$ 6,736.42
1942 .....	1,167.41
1943 .....	95,377.68
1944 .....	42,735.51
1945 .....	56,664.08

On or about August 15, 1946, plaintiff filed with the defendant claims for refund of the amount shown above for each of the years indicated, which claims were forthwith transmitted to the Commissioner of Internal Revenue; that more than six months have

elapsed since the receipt of said claim by the defendant and the Commissioner of Internal Revenue; that the said claims have neither been allowed nor rejected; that copies of said claims are attached hereto marked Exhibits A to E, inclusive, and by this reference made a part hereof.

Wherefore plaintiff prays for judgment against the defendant in the sum of \$202,681.10, together with interest thereon at the rate of six (6) per cent per annum to be computed proportionately from the dates of payment as set forth in paragraph IV above, together with its costs and disbursements herein to be taxed, and for such other relief as to this Court shall appear just.

JONES & BRONSON.

State of Washington,  
County of King—ss.

C. H. Black, being first duly sworn, on oath deposes and says: That he is President of Seattle Hardware Company, a Washington corporation, and plaintiff above named; that he is duly authorized to sign this complaint for said corporation; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true and correct.

/s/ C. H. BLACK.

Subscribed and Sworn to before me this 27th day of August, 1947.

[Seal] /s/ G. C. HOLDEN,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

## EXHIBIT A

## Claim

To Be Filed With the Collector Where Assessment  
Was Made or Tax Paid

State of Washington,

County of King—ss.

Name of taxpayer or purchaser of stamps, Seattle  
Hardware Company.

Business address, 501-1st Avenue South, Seattle,  
Washington.

The deponent, being duly sworn according to law,  
deposes and says that this statement is made on be-  
half of the taxpayer named, and that the facts given  
below are true and complete:

1. District in which return (if any) was filed, Tacoma.
2. Period (if for income tax, make separate form  
for each taxable year) from Dec. 1, 1940, to Nov.  
30, 1941.
3. Character of assessment or tax—Income and  
excess profits tax.
4. Amount of assessment, \$311,928.42; dates of  
payment, Quarterly in 1942 and by additional assess-  
ment, \$26,220.07, paid Jan., 1945.
6. Amount to be refunded, \$6,736.42.
8. The time within which this claim may be le-  
gally filed expires, under section 322 of Internal  
Revenue Code, on January, 1947.

Taxpayer's claims for refund for 1941, 1942, 1943,

1944 and 1945 are premised on additional invested capital credit for land and building and additional basis for loss on the sale of its land and building in 1945. The facts establishing taxpayer's claim for refund are as follows:

During the years 1901 through 1905 the taxpayer, Seattle Hardware Company, owned all of the stock of the Occident Trust Company, a Washington corporation. The Occident Trust Company acquired the land, lots 1 and 2, block 327, Seattle Tide-lands, on October 1, 1903. During the years 1904 and 1905 the Occident Trust Company erected the building on the land. On February 21, 1906, the Occident Trust Company transferred the land and building to the Seattle Hardware Company in complete liquidation of the stock of the Occident Trust Company owned by the Seattle Hardware Company, and thereafter the Occident Trust Company was dissolved by operation of law. The fair market value of the land was \$224,322, and the building, \$297,-502.70, as of February 21, 1906. The \$224,322 and \$297,502.77 is taxpayer's cost and is its basis for invested capital purposes and for purposes of determining loss on the sale. See Sec. 113(a) I.R.C. and Maltine Company, 5 T. C. No. 152.

/s/ SEATTLE HARDWARE  
COMPANY.

By .....  
Pres.

By .....  
Secy.

*Seattle Hardware Company*

SEATTLE HARDWARE COMPANY  
Claim for Refund  
1941

Excess Profits income per R.A.R. 6.10/46.....	\$517,042.06
Excess Profits tax credit, invested capital basis per R.A.R. 6/10/46.....	\$162,313.45
Add additional invested capital	
Land .....\$170,002.10	
Building ....\$53,502.70	
Less Depr.	
34/50 ..... 36,381.84      17,120.86	
	<hr/>
	187,122.96
Additional credit at 8%.....	14,969.84
	<hr/>
	177,283.29
Specific exemption .....	5,000.00
	<hr/>
Adjusted excess profits net income .....	334,758.77
	<hr/>
Tax on 250,000..... 91,500.00	
Tax on 84,758.77 at 45%.. 38,141.45	
	<hr/>
	129,641.45
Excess profits tax assessed per R.A.R. June 10, 1946.. 136,377.87	
	<hr/>
Overassessment .....	(6,736.42)

## EXHIBIT B

## Claim

To Be Filed With the Collector Where Assessment  
Was Made or Tax Paid

State of Washington,

County of King—ss.

Name of taxpayer or purchaser of stamps, Seattle  
Hardware Company.

Business address, 501-1st Avenue, South, Seattle,  
Washington.

The deponent, being duly sworn according to  
law, deposes and says that this statement is made  
on behalf of the taxpayer named, and that the facts  
given below are true and complete:

1. District in which return, (if any) was filed,  
Tacoma.
2. Period (if for income tax, make separate form  
for each taxable year) from Dec. 1, 1941, to Nov.  
30, 1942.
3. Character of assessment or tax, Income and  
excess profits tax.
4. Amount of assessment, \$457,509.72; dates of  
payment, Quarterly in 1943; final  $\frac{1}{4}$  Oct. 15, 1943.
6. Amount to be refunded, \$1,167.41.
8. The time within which this claim may be le-  
gally filed expires, under section 3313 of Internal  
Revenue Code, on October 15, 1947.

The deponent verily believes that this claim  
should be allowed for the following reasons:

Taxpayer's claims for refund for 1941, 1942, 1943,

1944 and 1945 are premised on additional invested capital credit for land and building and additional basis for loss on the sale of its land and building in 1945. The facts establishing taxpayer's claim for refund are as follows:

During the years 1901 through 1905 the taxpayer, Seattle Hardware Company, owned all of the stock of the Occident Trust Company, a Washington corporation. The Occident Trust Company acquired the land, lots 1 and 2, block 327, Seattle Tidelands, on October 1, 1903. During the years 1904 and 1905 the Occident Trust Company erected the building on the land. On February 21, 1906, the Occident Trust Company transferred the land and building to the Seattle Hardware Company in complete liquidation of the stock of the Occident Trust Company owned by the Seattle Hardware Company, and thereafter the Occident Trust Company was dissolved by operation of law. The fair market value of the land was \$224,322, and the building, \$297,502.70, as of February 21, 1906. The \$224,322 and \$297,502.70 is taxpayer's cost and is its basis for invested capital purposes and for purposes of determining loss on the sale. See Sec. 113(a) I.R.C. and Malting Company, 5 T. C. No. 152.

/s/ SEATTLE HARDWARE  
COMPANY.

By .....

Pres.

By .....

Secy.

SEATTLE HARDWARE COMPANY  
Claim for Refund  
1942

Excess profits tax credit			
Equity invested capital, 1941			
per R.A.R. 6/10/46.....		\$1,906,512.61	
Add income, F.Y. 1941, per			
R.A.R. 6/10/46 .....	\$723,827.54		
Less income and			
E-P tax .....	\$306,224.12		
Dividends paid .....	239,460.00		
Contributions (un- allowable) .....	100.00	545,784.12	178,043.42
Equity invested capital before land and building adjustment .....		2,084,556.03	
50% of average borrowed capital..		139,396.00	
		2,223,952.03	
Less reduction for inadmissible assets .....		90,000.00	
		2,133,952.03	
Adjustment for additional invested capital			
Land .....	170,002.10		
Building .....	53,502.70		
Less depreciation 35/50	37,451.89	16,050.81	186.052.91
Invested capital .....		2,320,004.94	
Excess profits credit—8% .....		185,600.40	

*Seattle Hardware Company*

SEATTLE HARDWARE COMPANY  
Claim for Refund  
1942

Calculation of Tax

	Tentative Tax 1941	Tentative Tax 1942
--	-----------------------	-----------------------

**Income tax**

Net income for D.V.E.P. tax per		
R.A.R. 12/11/45 .....	\$722,454.66	
Less dividends received credit.....	22,771.76	
	<hr/>	<hr/>
	699,682.90	\$699,682.90
Less : Tentative excess profits tax		
on 1941 rates .....	260,282.14	
Income subject to excess profits tax		510,470.23
	<hr/>	<hr/>
Normal and surtax income.....	439,400.76	189,212.67
	<hr/>	<hr/>

**Surtax**

Taxable at 6%.....	25,000.00	1,500.00
Taxable at 7% .....	414,400.16	29,008.05
Taxable at 16%.....	189,212.67	30,274.03
	<hr/>	<hr/>
	30,508.05	30,274.03
Normal tax at 24%.....	105,456.18	45,411.04
	<hr/>	<hr/>
	135,964.23	75,685.07

**Tax applicable**

212/365 of 1941.....	135,964.23	78,971.02
153/365 of 1942.....	75,685.07	31,725.52
	<hr/>	<hr/>

110,696.54

**Tax previously assessed,**

R.A.R. 6/10/46 .....	110,005.02	
	<hr/>	
Deficiency .....	691.52	

## SEATTLE HARDWARE COMPANY

Claim for Refund

1942

## Calculation of Tax

	Tentative Tax 1941	Tentative Tax 1942
Excess Profits Tax		
Excess profits net income, per R.A.R.		
6/10/46 (income credit basis).....	\$693,976.86	
Add 50% of interest on borrowed capital .....	7,093.77	
	701,070.63	
Less Specific exemption.... 5,000.00		
Excess profits credit..... 185,600.40	190,600.40	
Adjusted excess profits net income.....	510,470.23	510,470.23
Tax on 500,000.00 .....	254,000.00	
Tax on 10,470.23 at 60%.....	6,282.14	
Tax on 510,470.23 at 90%.....		459,423.21
	260,282.14	459,423.21
Tax applicable		
212/365 of 1941 .....	260,282.14	151,177.59
153/365 of 1942 .....	459,423.21	192,580.10
	343,757.69	
Tax previously assessed, R.A.R. 6/10/46	345,616.62	
Over-assessment .....	(1,858.93)	
Deficiency in income tax.....	691.52	
Net over-assessment .....	(1,167.41)	

## EXHIBIT C

## Claim

To Be Filed With the Collector Where Assessment  
Was Made or Tax PaidState of Washington,  
County of King—ss.Name of taxpayer or purchaser of stamps, Seattle  
Hardware Company.

Business address, 501-1st Avenue South, Seattle, Washington.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, Tacoma.
2. Period (if for income tax, make separate form for each taxable year) from December 1, 1942, to November 30, 1943.
3. Character of assessment or tax, Income and excess profits tax.
4. Amount of assessment, \$301,984.58; dates of payment, Quarterly in 1944.
5. Amount to be refunded, \$95,377.68.
6. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code, on February 15, 1947.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxpayer's claims for refund for 1941, 1942, 1943, 1944 and 1945 are premised on additional invested capital credit for land and building and additional basis for loss on the sale of its land and building in 1945. The facts establishing taxpayer's claim for refund are as follows:

During the years 1901 through 1905 the taxpayer, Seattle Hardware Company, owned all of the stock of the Occident Trust Company, a Washington cor-

poration. The Occident Trust Company acquired the land, lots 1 and 2, block 327, Seattle Tidelands, on October 1, 1903. During the years 1904 and 1905 the Occident Trust Company erected the building on the land. On February 21, 1906, the Occident Trust Company transferred the land and building to the Seattle Hardware Company in complete liquidation of the stock of the Occident Trust Company owned by the Seattle Hardware Company, and thereafter the Occident Trust Company was dissolved by operation of law. The fair market value of the land was \$224,322, and the building, \$297,502.70, as of February 21, 1906. The \$224,322 and \$297,502.77 is taxpayer's cost and is its basis for invested capital purposes and for purposes of determining loss on the sale. See Sec. 113(a) I.R.C. and Maltine Company, 5 T. C. No. 152.

**SEATTLE HARDWARE COMPANY****Claim for Refund****1943**

Net income, per R.A.R. 6/10/46.....	380,082.38
Less operating loss carry-back from 1945.....	40,307.27
Adjusted net income.....	339,775.11

**Income Tax Computation**

Less : Income subject to excess profits tax—	
Dividends received credit.....	3,530.88
Normal and surtax income.....	336,244.23
Normal and surtax at 40%.....	134,497.69
Excess profits tax.....	
	134,497.69
Income and excess profits tax previously assessed, R.A.R. 6/10/46.....	229,875.37
Net over-assessment .....	(95,377.68)

SEATTLE HARDWARE COMPANY  
Claim for Refund  
1943

Excess Profits Tax Computation			
Excess Profits net income per R.A.R. 6/15/46.....			372,414.80
Less operating loss.....			40,307.27
Adjusted excess profits income.....			<u><u>332,107.53</u></u>
Invested capital credit			
Equity invested capital, 1942, per refund claim....			2,084,556.03
Add income, F. Y. 1942 per R.A.R.			
6/10/46 .....	722,454.66		
Less income and E. P. tax per			
refund claim .....	454,454.23		
Dividends paid .....	240,000.00	694,454.23	28,000.43
			<u><u>2,112,556.46</u></u>
50% of average borrowed capital.....			98,140.00
			<u><u>2,210,696.46</u></u>
Less reduction for admissible assets.....			34,608.15
			<u><u>2,176,088.31</u></u>
Adjustment for additional invested capital			
Land .....		170,002.10	
Building .....	53,502.70		
Less depreciation 36/50	38,521.94	14,980.76	184,982.86
			<u><u>2,361,071.17</u></u>
Excess profits credit—8%.....			188,885.69
Excess profits credit carry back—1945.....			211,678.28
Specific exemption .....			5,000.00
			<u><u>405,563.97</u></u>
Total excess profits tax credits.....			<u><u>405,563.97</u></u>
Total excess profits tax credits (forward).....			405,563.97
Adjusted excess profits income.....			<u><u>332,107.53</u></u>
Subject to excess profits tax			

## EXHIBIT D

## Claim

To Be Filed With the Collector Where Assessment  
Was Made or Tax Paid

State of Washington,  
County of King—ss.

Name of taxpayer or purchaser of stamps, Seattle  
Hardware Company.

Business address, 501-1st Avenue South, Seattle,  
Washington.

The deponent, being duly sworn according to law,  
deposes and says that this statement is made on be-  
half of the taxpayer named, and that the facts given  
below are true and complete:

1. District in which return (if any) was filed,  
Tacoma.
2. Period (if for income tax, make separate form  
for each taxable year) from December 1, 1943, to  
November 30, 1944.
3. Character of assessment or tax, Income and  
excess profits.
4. Amount of assessment, \$149,720.47; dates of  
payment, Quarterly in 1945.
6. Amount to be refunded, \$42,735.51.
8. The time within which this claim may be le-  
gally filed expires, under section 322 of Internal  
Revenue Code, on February 15, 1948.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxpayer's claims for refund for 1941, 1942, 1943, 1944 and 1945 are premised on additional invested capital credit for land and building and additional basis for loss on the sale of its land and building in 1945. The facts establishing taxpayer's claim for refund are as follows:

During the years 1901 through 1905 the taxpayer, Seattle Hardware Company, owned all of the stock of the Occident Trust Company, a Washington corporation. The Occident Trust Company acquired the land, lots 1 and 2, block 327, Seattle Tidelands, on October 1, 1903. During the years 1904 and 1905 the Occident Trust Company erected the building on the land. On February 21, 1906, the Occident Trust Company transferred the land and building to the Seattle Hardware Company in complete liquidation of the stock of the Occident Trust Company owned by the Seattle Hardware Company, and thereafter the Occident Trust Company was dissolved by operation of law. The fair market value of the land was \$224,322, and the building, \$297,502.70, as of February 21, 1906. The \$224,322 and \$297,502.77 is taxpayer's cost and is its basis for invested capital purposes and for purposes of determining loss on the sale. See Sec. 113(a) I.R.C. and Maltine Company, 5 T. C. No. 152.

SEATTLE HARDWARE COMPANY  
Claim for Refund  
1944

Normal and surtax	
Net income per R.A.R. 6/10/46.....	272,591.87
Less income subject to excess profits tax—	
Dividends received credit .....	5,129.48
	<hr/>
	267,462.39
<hr/>	<hr/>
Normal and surtax at 40%.....	106,984.96
Excess profits tax.....	<hr/>
Total tax due.....	106,984.96
Income and excess profits tax previously assessed, R.A.R. 6/10/46.....	149,720.47
<hr/>	<hr/>
Net over-assessment .....	(42,735.51)
	<hr/>

*Seattle Hardware Company*

SEATTLE HARDWARE COMPANY  
Claim for Refund  
1944

Excess profits tax				
Invested Capital credit, current year				
Equity invested capital, 1943, per refund claim....	2,112,556.46			
Add income, F.Y. 1943, per R.A.R.				
June 10, 1946.....	380,082.38			
Less Income and E-P tax per				
refund claim .....	134,497.69			
Dividends paid .....	88,725.00	223,222.69	156,859.69	
50% of average borrowed capital.....			2,269,416.15	
			98,140.00	
Less reduction for inadmissible assets.....			2,367,556.15	
			34,608.15	
			2,332,948.00	
Adjustment for additional invested capital				
Land .....	170,002.10			
Building .....	53,502.70			
Less depreciation 37/50....	39,592.00	13,910.70	183,912.80	
			2,516,860.80	
Excess profits tax credit—8%.....			201,348.86	
Excess profits tax credit carry-forward—1943				
Excess profits credit—Invested capital basis 1943	188,885.69			
Excess profits credit—carry-back—1945.....	211,678.28			
			400,563.97	
Adjusted excess profits income, 1943, per				
refund claim .....	332,107.53			
Credit carry-forward to 1944.....			68,456.44	
Excess profits credit summary				
Invested capital credit, current year.....	201,348.86			
Unused excess profits credit adjustment.....	68,456.44			
Specific exemption .....	10,000.00			
Total credits .....			279,805.30	
Excess profits net income, per R.A.R. 6/10/46.....			272,142.52	
Income subject to excess profits tax.....				

## EXHIBIT E

## Claim

To Be Filed With the Collector Where Assessment  
Was Made or Tax Paid

State of Washington,

County of King—ss.

Name of taxpayer or purchaser of stamps, Seattle  
Hardware Company.

Business address, 501-1st Avenue South, Seattle,  
Washington.

The deponent, being duly sworn according to law,  
deposes and says that this statement is made on be-  
half of the taxpayer named, and that the facts given  
below are true and complete:

1. District in which return (if any) was filed,  
Tacoma, Washington.
2. Period (if for income tax, make separate  
form for each taxable year) from Dec. 1, 1944, to  
Nov. 30, 1945.
3. Character of assessment or tax, Income tax.
4. Amount of assessment, \$56,664.08; dates of  
payment, Quarterly, Feb. 15, May 15, Last half Au-  
gust 12, 1946.
5. Amount to be refunded, \$56,664.08.
6. The time within which this claim may be le-  
gally filed expires, under section 322 of Internal  
Revenue Code, on August 12, 1948.

The deponent verily believes that this claim  
should be allowed for the following reasons:

Taxpayer's claim for refund for 1941, 1942, 1943,  
1944 and 1945 are premised on additional invested

capital credit for land and building and additional basis for loss on the sale of its land and building in 1945. The facts establishing taxpayer's claim for refund are as follows:

During the years 1901 through 1905 the taxpayer, Seattle Hardware Company, owned all of the stock of the Occident Trust Company, a Washington corporation. The Occident Trust Company acquired the land, lots 1 and 2, block 327, Seattle Tidelands, on October 1, 1903. During the years 1904 and 1905 the Occident Trust Company erected the building on the land. On February 21, 1906, the Occident Trust Company transferred the land and building to the Seattle Hardware Company in complete liquidation of the stock of the Occident Trust Company owned by the Seattle Hardware Company, and thereafter the Occident Trust Company was dissolved by operation of law. The fair market value of the land was \$224,322, and the building, \$297,502.70, as of February 21, 1906. The \$224,322 and \$297,502.77 is taxpayer's cost and is its basis for invested capital purposes and for purposes of determining loss on the sale. See Sec. 113(a) I.R.C. and Maltine Company, 5 T. C. No. 152.

/s/ SEATTLE HARDWARE  
COMPANY.

By .....

Pres.

By .....

Secy.

SEATTLE HARDWARE COMPANY  
Claim for Refund  
1945

Net Income per Income Tax Return.....	\$142,535.48
Less additional basis against sale of land and building	
Land	
Balance set up on books, 1906....	\$220,000.00
Less amounts charged to surplus in prior years.....	160,000.00
	_____
Basis per return.....	60,000.00
Appraisal of land at liquidation of Occident Investment Com- pany to taxpayer in 1906.....	224,322.00
	_____
Additional basis for land.....	164,322.00
Additional improvement assess- ments charged to expense 1906-13 .....	5,680.10
	_____
Total for land .....	170,002.10
	_____
Building	
Balance set up on books, 1906 (cost) .....	244,000.00
Appraisal of land at liquidation of Occident Investment Com- pany to taxpayer in 1906.....	297,502.70
	_____
	53,502.70
Less depreciation on 50 year life 38/50 .....	40,662.05
	_____
Total for building.....	12,840.65
Total additional basis for gain or loss on sale of land and building.....	182,842.75
	_____
Operating loss .....	(40,307.27)
	_____

*Seattle Hardware Company*

SEATTLE HARDWARE COMPANY  
Claim for Refund  
1945

## Invested Capital Credit Adjustment (for carry-back)

Invested capital per return			
Adjustments for R.A.R.'s 1941-44,			
6/10/46 .....		\$2,308,104.80	
1941 Income reduced.....	\$ 2,500.00		
Tax reduced .....	5,057.43	2,557.43	
1942 Income increased.....	3,900.00		
Tax reduced .....	1,888.08	5,788.08	
1943 Income increased.....	1,400.00		
Tax reduced .....	109.21	1,509.21	
1944 Income reduced.....	1,100.00		
Tax reduced .....	258.75	(841.25)	
Adjustment for refund claims, prior years (tax over-assessments)			
1941 .....	6,736.42		
1942 .....	1,167.41		
1943 .....	95,377.68		
1944 .....	42,735.91	146,017.42	
		2,463,135.69	
		2,463,135.69	
Adjustment for additional invested capital			
Land .....	170,002.10		
Building .....	53,502.70		
Less depreciation			
38/50 .....	40,662.05	12,840.65	182,842.75
Invested capital .....			
		2,645,978.44	
Excess profits tax credit—8%.....		211,678.28	

[Endorsed]: Filed Aug. 29, 1947.

[Title of District Court and Cause.]

## ANSWER

Comes now the defendant, Clark Squire, by his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, and in answer to the plaintiff's complaint admits, denies and alleges as follows:

### I.

Paragraph 1 is admitted.

### II.

Paragraph 2 is admitted.

### III.

Paragraph 4 is admitted.

### IV.

Paragraph 3 is admitted.

### V.

Paragraph 5 is denied.

### VI.

Paragraph 6 is denied, except that the second subparagraph of paragraph 6 is admitted.

## Affirmative Defenses

In the event it should be held that the plaintiff is entitled to recover by reason of the allegations in its complaint such recovery should be limited and reduced to the extent that the amount of the over-

payments of excess profits tax has been claimed as a deduction in computing income tax and to the extent that such overpayments have furnished the basis for post-war refunds which have been allowed.

Defendant further alleges that interest is allowable on any gross overpayment of excess profits tax only to January 1, 1946, and the net overpayment bears interest thereafter.

Wherefore, having answered, the defendant prays that the plaintiff's complaint be dismissed and the defendant awarded his allowable costs.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ THOMAS R. WINTER,  
Special Assistant to the Chief Counsel, Bureau of  
Internal Revenue.

Copy received Jan. 8, 1948. Jones & Bronson,  
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 9, 1948.

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[Title of District Court and Cause.]

### PRE-TRIAL ORDER

This case came regularly on for pre-trial before the Honorable Charles H. Leavy, District Judge, on the 4th day of May, 1948. Plaintiff was represented by H. B. Jones and A. R. Kehoe, Attorneys at Law, Seattle, Washington, and defendant was represented by J. Charles Dennis, United States Attorney for the Western District of Washington, Thomas R.

Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, and Homer R. Miller, Special Assistant to the Attorney General, as his attorneys.

From the proceedings had and taken at said pre-trial hearing it appears:

1. This is an action brought under Section 24(5) of the Judicial Code as amended and as qualified by Section 3772 of the Internal Revenue Code as amended.
2. The complaint embraces a cause of action for income and excess profits taxes allegedly erroneously and illegally assessed and collected.
3. The parties have filed a stipulation of facts stating that for the purposes of this litigation, certain facts set out therein are to be taken as true, subject to objection as to materiality or relevancy of any facts stated, and the right of either party to introduce other evidence not inconsistent with the facts stipulated.

**It Is Now Ordered:**

1. That the facts stated in said stipulation are to be taken as true for the purposes of this case, subject to the right of either party herein to object to any facts stipulated on the ground of relevancy and materiality, and the right of either party to introduce further evidence not inconsistent with the facts stipulated.

2. The following is a brief abstract of the contentions of the respective parties:

(a) The plaintiff contends that in determining invested capital credit for purposes of computing excess profits taxes for the fiscal years ended November 30, 1941, through November 30, 1945, inclusive, and in determining basis for purposes of computing gain or loss on the sale of the property in the fiscal year ended November 30, 1945, plaintiff is entitled to a basis of cost for Lots 1 and 2 of \$224,322.00, and a cost for improvements of \$270,751.38, subject to adjustments, additions and depreciation.

In the alternative and in the event it is held the \$224,322.00 and \$270,751.38 cost is not applicable, then plaintiff contends that it is entitled to the cost per the books of Lots 1 and 2, viz., \$220,000.00 for purposes of determining invested capital credit for the fiscal years ended November 30, 1941, through November 30, 1945, inclusive, and for purposes of determining the basis to be used in computing gain or loss on the 1945 sale.

(b) The defendant contends that plaintiff acquired Lots Nos. 1 and 2 in April, 1901, at a cost of \$60,000.00 before additions and improvements. That the cost to plaintiff of constructing the building before adjustments covered by jeopardy assess-

ments hereinafter referred to, was \$244,000.00, and that such amounts have been properly used in plaintiff's returns and by the Commissioner of Internal Revenue in determining invested capital credit for the fiscal years ended November 30, 1941, to November 30, 1945, inclusive, and as an unadjusted basis for loss on the 1945 sale.

(c) Defendant further contends that although the evidence may show that the legal title of Lots 1 and 2 on which the building was constructed was carried in the name of Ira Bronson (plaintiff's attorney) from April 19, 1901, to October 1, 1903, and in the name of Occident Trust Company from October 1, 1903, to February 21, 1906, that plaintiff was during all of said time, in substance and reality, the owner of the property, and that the said Ira Bronson and the said Occident Trust Company were in truth and reality mere agents, nominees, or instrumentalities of the plaintiff, and held the title to the said property for and on behalf of the plaintiff and as plaintiff's agents, trustees, or nominees. Defendant consequently contends that for tax purposes it should be held that the defendant was in substance and reality the purchaser of the property in 1901 and as having constructed the building upon said property. Consequently, the cost should be determined by what was paid for the lots and for construction of the building, rather than by the fair market value of the land and building on the date said property was deeded to plaintiff by said Occident Trust Company.

(d) Defendant does not admit or concede that the Occident Trust Company was legally a wholly-owned subsidiary of the plaintiff, nor that there was a liquidation of said Occident Trust Company in February, 1906, as contended by the plaintiff to have been carried out by a distribution of its assets in liquidation in exchange for stock. Defendant does not admit or concede that there was a liquidation of the Occident Trust Company prior to the year 1909 when the corporate existence of said Occident Trust Company was terminated for non-payment of corporate fees.

(e) Defendant further contends that under the provisions of Sections 113(a)(11), 113(a)(15), and 112(b)(6), Internal Revenue Code, no gain or loss shall be recognized where property is received by a corporation distributed in complete liquidation of another corporation, or when property is acquired during an affiliation. It is contended that under said Sections that even if plaintiff is correct as to the proper cost basis of the property, no gain or loss being recognizable under the facts in this case, plaintiff would not be entitled to a deductible loss on account of the 1945 sale or to invested capital credit for the years 1941 to 1945, inclusive, except upon the basis of the original actual amounts expended for the land and construction of the building.

(f) Plaintiff's alternative contention is not covered by its claim for refund.

(g) The property acquired by plaintiff on or

about February 21, 1906, from Occident Trust Company was not property previously paid in for stock, as paid in surplus or as a contribution to capital within the provisions of Section 718(a) (2), Internal Revenue Code, so as to be includable in invested capital under Section 718, Internal Revenue Code, and said property did not constitute accumulated earnings and profits within Section 718(a) (4), Internal Revenue Code.

3. Either party herein shall have the right within such time as the Court shall hereinafter determine, to submit proposed findings of facts and conclusions of law.

4. Plaintiff herein is not entitled to recover on its claim for refund for the fiscal year ended November 30, 1942, for the reason that the claim was not filed within the time provided by statute.

5. The findings, conclusions, and judgment in the case at bar shall not be considered as res judicata as to any items embraced in or included in jeopardy assessments made by the Commissioner on or about April 27, 1948, for income taxes for the year ended November 30, 1943, in the amount of \$8,537.61, plus interest, and for the fiscal year ended November 30, 1945, in the amount of \$5,928.50, plus interest, and a proposed overassessment of excess profits taxes for the fiscal year ended November 30, 1943, in the amount of \$17,815.92, plus interest, except insofar as the findings, conclusions, or judgment in the case at bar specifically deter-

mine and decide the specific questions or issues involved in said jeopardy assessments or proposed overassessment, and both plaintiff and defendant herein expressly waive their right to plead or assert res judicata with respect to said jeopardy assessments and overassessment except to the extent herein stated.

6. It Is Further Ordered, that the issues to be tried at the hearing of this case shall be those set forth above in the contentions of the parties as contested issues. It was stipulated at the pre-trial by the parties herein and approved by this Court that after the Court has decided the contested issues, if and to the extent that the decision shall be favorable to the plaintiff, the defendant will propose a recomputation of taxes for the fiscal years ended November 30, 1941; November 30, 1943; November 30, 1944, and November 30, 1945, in accordance with this Court's decision, giving effect therein to any adjustments of the taxes which may be proper under the provisions of law, and if such computations are agreed to by the plaintiff herein, that shall become the basis for the judgment to be entered herein. If the parties are unable to agree on said recomputations, this Court reserves jurisdiction to decide the differences in a further and final hearing to be held at this Court's convenience. It is understood that in determining the amount of said judgment, the adjustments reflected in the jeopardy assessments and overassessment above referred to shall not

be considered, except to the extent stipulated herein.

Dated and entered this 4th day of May, 1948.

/s/ CHARLES H. LEAVY,

United States District Judge.

Approved this 3rd day of May, 1948.

/s/ A. R. KEHOE,

(Of Jones & Bronson),

Attorneys for Plaintiff.

/s/ J. CHARLES DENNIS,

United States Attorney.

/s/ THOMAS R. WINTER.

[Endorsed]. Filed May 4, 1948.

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[Title of District Court and Cause.]

#### STIPULATION

The parties hereto by their respective attorneys hereby stipulate and agree that for the purposes of this litigation and upon any hearing of this cause, the following facts shall be taken to be true. The stipulation is subject to the right of either party to offer evidence at the trial of the case tending to establish other facts not inconsistent with these herein stipulated, and subject to the right of either party to object to any facts stipulated herein on the ground of irrelevancy or immateriality.

## First

## In Re Parties:

1. Seattle Hardware Company is a corporation duly organized and existing under the laws of the State of Washington. Its articles of incorporation were filed March 17, 1885, and it has been in continuous existence since that date.
2. Clark Squire, the defendant, now is and since March 6, 1941, has been, the duly appointed, qualified and acting Collector of Internal Revenue for the Collection District of Washington, having his office and residing at the City of Tacoma, in the jurisdiction of this Court; that the acts done by the defendant as herein stated were done in his representative capacity and under and pursuant to the direction of the Commissioner of Internal Revenue of the United States.

## Second

## In Re Return and Payment of Federal Taxes:

3. For the fiscal years ended November 30, 1941, to November 30, 1945, inclusive, plaintiff kept its books and records and filed its income, declared value excess profits, and excess profits tax returns on the accrual basis and on the basis of fiscal year ended November 30.

4. For the fiscal year ended November 30, 1941, plaintiff filed its corporation income, declared value excess profits, and defense tax returns indicating income taxes of \$156,604.62, and declared value excess profits taxes of \$3,711.21. Payments of these

amounts were made to the defendant in quarterly installments as follows: \$40,078.96 on February 14, 1942; \$40,078.95 on May 7, 1942; \$40,078.95 on August 6, 1942, and \$40,078.97 on November 11, 1942. There was likewise filed a corporation excess profits tax return for said fiscal year 1941 indicating an excess profits tax, after the correction of a mathematical error, of \$125,392.52. This amount was paid in installments as follows: \$31,373.13 on February 14, 1942; \$31,339.80 on May 7, 1942; \$31,339.80 on August 6, 1942, and \$31,339.79 on November 11, 1942. On a list of January 26, 1945, there were assessed for the fiscal year 1941 additional income tax of \$7,923.03, with interest of \$1,400.86 and additional declared value excess profits tax of \$2,332.80, with interest of \$412.46. These amounts totaling \$12,069.15 were paid on February 15, 1945. On a list of January 26, 1945, there was assessed additional excess profits tax for the fiscal year 1941 of \$15,964.24, with interest of \$2,822.61. These amounts totaling \$18,786.85 were paid on February 15, 1945. On Schedule No. 103052 signed by the Commissioner on January 31, 1946, a certificate of overassessment was issued allowing an overassessment of excess profits tax of \$646.87 and an overassessment of interest of \$114.37. On Schedule No. 112282 signed by the Commissioner on December 17, 1946, a certificate of overassessment was issued allowing overassessments for the fiscal year 1941 of income tax of \$560.41 and of interest of \$99.09, and of declared value excess profits tax of \$165.00 and of interest of \$29.17. Likewise on Schedule No. 112282 a certificate

of overassessment was issued allowing an overassessment of excess profits tax of \$4,332.02 and of interest in the amount of \$765.94.

5. For the fiscal year ending November 30, 1942, Seattle Hardware Company filed its corporation income and declared value excess profits tax return indicating an income tax due of \$111,791.47, and no declared value excess profits tax. This amount was paid in four installments as follows: \$27,947.87 on February 10, 1943; \$27,947.85 on May 10, 1943; \$27,947.85 on August 5, 1943, and \$27,947.90 on November 6, 1943. There was likewise filed a corporation excess profits tax return for the fiscal year 1942 indicating an excess profits tax due of \$393,800.27. This amount was paid in four installments as follows: 3 installments of \$98,450.08 each on February 10, 1943; May 10, 1943; August 5, 1943, and an installment of \$98,450.03 on November 6, 1943. With respect to income tax, Seattle Hardware Company was allowed an offsetting tax credit under Section 3806(b) of the Internal Revenue Code in the amount of \$4,536.84. With respect to excess profits tax, there was allowed an offsetting tax credit under Section 3806(b) of the Internal Revenue Code of \$43,545.18. A consent extending the period of limitation upon assessment of income and profits tax for the fiscal year 1942 to any time on or before June 30, 1947, was duly executed and filed by plaintiff herein.

On a list of November 29, 1946, there was assessed an additional income tax for the fiscal year 1942 in the amount of \$2,814.95, with interest of \$611.21.

These amounts totaling \$3,426.16 were paid on December 17, 1946, by credit appearing on Schedule No. 112282. On Schedule No. 112406 signed by the Commissioner on December 20, 1946, there was allowed an overassessment of excess profits tax of \$3,840.14, which, after a postwar credit reduction of \$199.62, came to a net amount of \$3,640.52.

6. For the fiscal year ending November 30, 1943, Seattle Hardware Company filed its corporation income and declared value excess profits tax return indicating an income tax due of \$72,937.42 and no declared value excess profits tax. This amount was paid in the following manner: 2 installments of \$18,234.36 each on February 15 and May 11, 1944, and 2 installments of \$18,234.35 each on August 5 and November 8, 1944. A corporation excess profits tax return for the fiscal year 1943 was likewise filed indicating an excess profits tax due of \$229,047.16. This amount was paid in four installments of \$57,261.79 each on February 15, May 11, August 5 and November 8, 1944. With respect to excess profits tax due there was allowed an offsetting tax credit under Section 3806(b) of the Internal Revenue Code in the amount of \$72,000.00. On list of November 29, 1946, there was assessed additional income tax of \$1,095.37, with interest of \$174.82. These amounts totaling \$1,270.19 were paid on December 17, 1946, by a credit appearing on Schedule No. 112282. On Schedule No. 112282 a certificate of overassessment was issued indicating an overassessment of excess profits tax in the amount of \$3,454.58 which by

reason of a postwar credit of \$345.46 was reduced to a net amount allowed of \$3,109.12.

7. For the fiscal year ending November 30, 1944, Seattle Hardware Company filed its corporation income and declared value excess profits tax return indicating an income tax due of \$75,649.21, and no declared value excess profits tax. This amount was paid in four installments as follows: 3 installments of \$18,912.30 each on February 9, May 8, August 11, 1945, and an installment of \$18,912.31 on November 15, 1945. A corporation excess profits tax return for the fiscal year 1944 was filed showing an excess profits tax due of \$74,330.01. This amount was paid in the following manner: 2 installments of \$18,582.51 each on February 9 and May 18, 1945, \$18,582.50 on August 11, 1946, and \$11,149.49 on November 15, 1945. The balance of \$7,433.00 was abated by reason of a postwar credit in that amount. On list of November 29, 1946, there was assessed additional income tax of \$270.14 with interest of \$26.91. These amounts were paid on December 17, 1946, by credit on Schedule No. 112282. On Schedule No. 112406 there was allowed an overassessment of excess profits tax for the fiscal year 1944 in the amount of \$1,871.72.

8. For the fiscal year ended November 30, 1945, Seattle Hardware Company filed its corporation income and declared value excess profits tax return indicating an income of \$56,664.08 and no declared value excess profits tax. This amount was paid as follows: \$14,166.02 on February 11, \$14,116.02 on

May 10 and \$28,332.04 on August 13, 1946. There was likewise filed a corporation excess profits tax return indicating no excess profits tax due.

### Third

#### In Re Sale of Land, Building, Furniture and Fixtures:

9. In the fiscal year ending November 30, 1945, plaintiff sold Lots Nos. 1, 2, and 3, Block 327, Seattle Tidelands in King County, Washington, with improvements thereon, and certain furniture and fixtures, for the gross sales price of \$125,000.00, the selling expenses being \$4,584.30 and the net selling price being \$120,415.70. In its income tax return for 1945 plaintiff reported a loss on the sale of \$166,-847.16.

10. The basis for loss equivalent to that used in plaintiff's 1945 tax return but stated in greater detail, is as follows:

Cost of Lots 1 and 2		\$60,000.00
Paving		3,922.99
Lot 3		60,291.15
Paving		1,872.03
Building cost:	\$469,569.05	
Depreciation:	321,224.83	148,344.22
<hr/>		
Furniture and fixtures, cost	22,743.75	
Depreciation:	9,911.28	12,832.47
<hr/>		
Total		\$287,262.86

11. The loss was computed as follows:

Cost less depreciation	287,262.86
Selling price less expenses sale	120,415.70
Loss reported	\$166,847.16

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12. The table below sets forth the contentions of the plaintiff and defendant herein as to the correct basis before additions, depreciation, and adjustments for determining loss on property sold by plaintiff during the fiscal year ended November 30, 1945, and for determining the equity invested capital credit for excess profits tax purposes under Section 718, Internal Revenue Code.

Plaintiff

	Per Complaint		
	Per Returns	or Claim	Defendant
Land	\$ 60,000.00	\$224,322.00	\$ 60,000.00
Bldgs.	244,000.00	297,502.70	244,000.00
Total	\$304,000.00	\$521,824.70	\$304,000.00

13. The loss on sale of land and buildings by taxpayer as allowed by the Commissioner of Internal Revenue in the determination of taxpayer's income and excess profits tax liability for the year ended November 30, 1945, was computed as follows:

Taxpayer's basis for determining loss, as

set forth above	\$287,262.86
Selling price less sale expenses	120,415.70
Loss per return	\$166,847.16

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## Fourth

## In Re Acquisition and Sale of Land and Building by Plaintiff:

14. The building account in the amount of \$244,000.00 with later additions and adjustments became the \$469,569.05 building cost used for purposes of determining gain or loss in reporting the sale in the 1945 Return. The \$244,000.00, with later additions, was likewise used for purposes of determining equity invested capital as it related to building costs in the returns for 1941 through 1945.

15. In its 1941 Income and Excess Profits Tax Return in reporting invested capital credit, Seattle Hardware Company used the book basis of Lots 1 and 2, namely \$220,000.00. The return was audited by the Commissioner of Internal Revenue and an additional assessment of \$26,220.27 was made on January 8, 1945, based in part on adjusting invested capital credit by reducing equity invested capital for Lots 1 and 2 from \$220,000.00 to \$60,000.00.

16. The ultimate taxes determined and paid for 1941, 1942, 1943, 1944 and 1945 were in part on the basis of a reduction in equity invested capital for Lots 1 and 2 to \$60,000.00.

17. The \$60,000.00 cost for Lots 1 and 2 was used by plaintiff for purposes of determining gain or loss in reporting the sale in the 1945 return.

18. It is further stipulated herein that the fair

market value as of February 21, 1906, of the land (Lots 1 and 2) was \$224,322.00, and of the building was \$270,751.38. Defendant does not admit that these values are correct as to any other date either before or after Feb. 21, 1906.

### Fifth

#### In Re Claims for Refund:

19. It is further stipulated that the plaintiff herein filed claims for refund of income and excess profits taxes herein involved, which claims for refund were in words and figures as shown by exhibits attached to plaintiff's complaint herein.

20. That all of said claims for refund were timely filed except the claim for the fiscal year ended November 30, 1942, which claim for refund was barred by the Statute of Limitations. It is stipulated that because of the bar of the Statute of Limitations, plaintiff herein is not entitled to recover anything for the fiscal year ended November 30, 1942.

21. All the claims for refund were transmitted by the defendant herein to the Commissioner of Internal Revenue. More than six months have elapsed since the receipt of the claims by the defendant and the Commissioner, and said claims have neither been officially allowed or rejected by the Commissioner.

## Sixth

## Miscellaneous:

22. Plaintiff acquired Lot No. 3, Block 327, Seattle Tidelands, in 1919, for a cash payment of \$60,291.15.

23. It is further stipulated that in the event this Court decides the contested issues involved in any amount or to any extent in favor of the plaintiff herein, the defendant herein will prepare a recomputation of taxes for the fiscal years ended November 30, 1941, to November 30, 1945, inclusive, in accordance with this Court's decision, and will submit such recomputation to plaintiff herein with a view of attempting to reach an agreement upon the correct computation of the judgment to be entered herein. If the parties are unable to agree upon said computations, this Court hereby reserves jurisdiction to decide and pass upon any differences in further and final hearings to be held as determined by this Court.

24. It is stipulated by and between the parties that on or about April 27, 1948, the Commissioner of Internal Revenue made a jeopardy assessment against the plaintiff herein for income taxes for the fiscal year ended November 30, 1943, in the amount of \$8,537.61, plus interest of \$2,151.24, and for the fiscal year ended November 30, 1945, of \$5,928.50, plus interest of \$782.40. The Commissioner has also proposed an overassessment of excess profits taxes for the fiscal year ended November 30, 1943, in the amount of \$17,815.92, plus interest. It is further

stipulated by and between the parties herein that the final decision and judgment in the case at bar shall not be considered or construed by either party herein as being res judicata as to the deficiencies or overassessments above mentioned, except to the extent that the decision in the case at bar shall include the specific issues or questions involved in the jeopardy assessments or overassessments above mentioned, and both plaintiff and defendant herein expressly waive the filing, asserting, pleading, or contending in any future proceeding involving the jeopardy assessments or overassessments above referred to of any claim based upon the decision or judgment in the case at bar being res judicata, except to the extent above mentioned and referred to.

25. It is further stipulated and agreed that in the event the Court should decide the contested issues in this case in favor of the plaintiff herein in whole or in part that in computing and determining the correct amount of the judgment to be entered herein, any adjustments which are proper under the Revenue Laws of the United States on the basis of the Court's decision may be made and considered in the making of said computations.

Dated at Seattle, Washington, this 3 day of May, 1948.

A. R. KEHOE  
JONES & BRONSON BY  
A. R. KEHOE,  
Attorneys for Plaintiff.

J. CHARLES DENNIS,  
United States Attorney.

THOMAS R. WINTER,  
Assistant to the Chief Coun-  
sel, Bureau of Internal  
Revenue.

HOMER R. MILLER,  
Special Assistant to the At-  
torney General.  
Attorneys for Defendant.

[Endorsed]: Filed May 4, 1948.

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In The District Court of the United States for the  
Western District of Washington, Southern  
Division.

No. 1059

Seattle Hardware Company,

Plaintiff,

vs.

Clark Squire, Collector of Internal Revenue,  
Defendant.

#### DEPOSITION OF ROY P. BALLARD

Be It Remembered, that on Tuesday, May 4, 1948,  
9:30 a m., at Doctors Hospital, Seattle, Washington,  
before Bruce Moburg, Notary Public in and for the  
State of Washington, appeared Roy P. Ballard, a  
witness on behalf of Plaintiff herein.

(Deposition of Roy P. Ballard.)

The Plaintiff appearing by H. B. Jones, Esq., and A. R. Kehoe, Esq., of Messrs. Jones & Bronson, its attorneys and counsel;

The Defendant appearing by Homer R. Miller, Esq., and Thomas R. Winter, Esq., its attorneys and counsel;

Whereupon, the following proceedings were had:

Mr. Jones: The deposition of R. P. Ballard, witness on behalf of the Plaintiff, is taken pursuant to stipulation.

Mr. Miller: We understand that the rules will govern as far as objections are concerned; we can object to anything except the form of the question, under the rules, at the trial.

Mr. Jones: Yes, that is all right.

ROY P. BALLARD,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, deposed and said as follows:

Direct Examination

By Mr. Jones:

Q. State your name.

A. Roy P. Ballard.

Q. Where do you live?

A. 28, —no, —2345-31st South, Seattle.

Q. You are presently confined by an accident to a hospital here in Seattle and are unable to go to Tacoma for the trial today of this Seattle Hardware Company case, are you, Mr. Ballard?

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A. That is correct.

Q. Will you state your age? [2\*]

A. 74 years last December 12th.

Q. What is your position or connection with the Seattle Hardware Company?

A. I am at present secretary and have been a stockholder for 35 or 45, —— 45 years or more.

Q. And have you been continuously connected with the company during all that time?

A. Actively connected since 1897, when I graduated from college.

Q. What was your position with the company just generally from say 1901 to 1906?

A. In charge of the builder's hardware department, —— contract builders hardware.

Q. Were you a trustee of the company during that time?

A. The records will show when I was elected trustee. I don't remember the exact year. They will also show when I became a stockholder.

Q. You are the R. P. Ballard who is mentioned in the minutes as a trustee? A. Yes.

Q. Were you related to any of the executive officers of the company? A. At what time?

Q. Well, say from 1901 to 1906? A. No.

Q. Who was M. D. Ballard?

A. He was my father, but he was not an executive officer. He was a trustee of the company, but not active.

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\* Page numbering appearing at foot of page of original Reporter's Transcript.

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Q. How closely were you connected with the executive officers during that period?

A. Well, Mr. Burwell's father was vice-president and general manager and I was very closely connected with him. I had charge of one of the most important departments in the retail store at that time on account of the growth of the city, so much builders hardware being required and used. It was quite a feature of our business.

Q. Do you recall the formation of a corporation under the laws of the State of Washington known as Occident Trust Company? A. I do.

Q. What was the occasion for forming that company, if you know?

A. We formed that company to act as a holding company, real estate holding company in order that we might not have to spoil the looks of our financial statement by the borrowing that it would be necessary to do in buying the property and building a building.

Q. Do you recall whether there were any other reasons for forming the company besides what you have just [4] mentioned?

A. Not that I know of.  
of the matter of risk of liability for claims in connection with building construction?

A. Claims against the company, you mean?

Q. That might arise in connection with construction.

(Deposition of Roy P. Ballard.)

A. Well, that again was just considered the same thing; in other words, we protected the Seattle Hardware Company as a hardware store against undue financial risk.

Q. My question is whether any consideration of that kind was in the minds of the executives of the Seattle Hardware Company as expressed to you as the reason for forming the Occident Trust Company?

A. I don't know that anything definitely was so expressed. It so happened that we did, however.

Q. Did what?

A. There was a claim against the Occident Trust Company which otherwise would have been against the Seattle Hardware Company, a claim for personal injuries. It was settled and didn't amount to anything but it might have amounted to a lot.

Q. Can you tell us who these gentlemen were who appear, according to the records, as the officers of Occident [5] Trust Company: M. D. Ballard, C. H. Black and F. W. Baker,—what was their relation to Seattle Hardware Company?

A. M. D. Ballard was the first president of Seattle Hardware Company. He had retired at this time when the Occident Trust Company was formed, and Mr. C. H. Black was president of the company, but when they formed the Occident Trust Company they elected father president. C. H. Black was vice-president I believe and F. W. Baker was treasurer. He was our treasurer in the Seattle Hardware Company.

(Deposition of Roy P. Ballard.)

Q. Have you made a search to see if you could find the stock certificates of the Occident Trust Company or any stock ledger?

A. That is the most I have been doing for the last three months.

Q. Were you able to locate any such papers?

A. No.

Q. Do you know whether stock was issued or the stock of the Occident Trust Company?

A. No.

Q. Do you recall having seen the certificates or not? A. No, no.

Q. Do you know who was then recorded as the owner of the stock of Occident Trust Company; and when I say that, [6] I mean in 1904 and '5 and '6?

A. The owners of the stock of the—

Q. Of the Occident Trust Company, yes.

A. It has been my thought all the time that the Seattle Hardware Company was the owner. I have good reasons for that, which I can supply later.

Q. Will you state your reasons?

A. Well, it was necessary to borrow money naturally to build a building of that size and expense, and the deal was made with G. Alston Hole representing the Travelers Insurance Company, and when we made the loan with the Travelers Insurance Company it was necessary,—when we effected the loan it was necessary to give the Travelers Insurance Company guarantees other than the property

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itself because of the fact that the Occident Trust Company had no assets other than the property and the prospective building that they would erect with this money, therefore the individual stockholders of the Seattle Hardware Company signed the notes,—endorsed the notes,—of which I was one of the stockholders. Those notes we have in evidence, I suppose.

Q. You said that the Occident Trust Company had no assets other than its real estate—

A. Not to my knowledge. [7]

Q. And there was a building erected on that property. Lots 1 and 2, Block 327, Seattle Tide Lands, was there not?

A. Prior to our acquiring it, you mean, or at this particular time?

Q. Well, that building was erected, I think the record shows, along in 1904 or '5; is that your recollection?

A. That's right; completed in 1905.

Q. What I wanted to ask you particularly was this: aside from the land and the building, did Occident Trust Company ever have any other assets? A. Not that I know of.

Q. Were you in position to know whether they did or not?

A. Naturally; being a director of it and a stockholder.

Q. The record shows that in February of 1906, the property, that is, the real estate and buildings,

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were transferred by the Occident Trust Company to the Seattle Hardware Company. Do you remember the occasion or the reason for doing that?

A. No, I don't.

Q. Have you looked at the minutes relating to that transaction,—the minutes of Seattle Hardware Company?

A. I read all the minutes of the Seattle Hardware Company within the last month but I don't recall that being [8] covered, although it no doubt was.

Q. There is reference in some of the books of account to the cash book of the Seattle Hardware Company,—well, it would be cash book No. 9 or cash books prior to No. 10, which I believe is not available. Have you made a search for that cash book?

A. Not only one, but three.

Q. And were you able to locate it?

A. We were not.

Q. Do you have any idea what has become of it?

A. No, or I would have found it long ago and got the trouble over with.

(Discussion off the record.)

Q. Mr. Ballard, I am referring to page 30 of the minute book of the Seattle Hardware Company which contains minutes of a trustees' meeting following a stockholders' meeting on February 20, 1906.

A. That was practically at the completion of the new building.

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Q. Yes. And it contains this that I will read you: "It was then moved by C. H. Black and supported by F. W. Baker that the capital stock be made fully paid by increasing the valuation of real estate on their books [9] \$100,000, making the book value thereof \$225,000, this being considered a fair and reasonable valuation based on recent sales of property in the immediate vicinity and that escrow stock notes be retired. Unanimously carried. It was further moved and carried that real estate be transferred from Occident Trust Company to this company but deed not placed of record for the present."

What I want to ask you relative to that is with regard to the real estate which is mentioned there. Do you know what real estate that refers to?

A. Yes.

Q. What was it?

A. Lots 1 and 2, Block 327, Seattle Tide Lands. I remember that meeting very well, also.

Q. Do you have anything to add to what is shown in the minutes with respect to the authorization to transfer the real estate from Occident Trust Company to the Seattle Hardware Company, as to the occasion of its being done at that time?

A. I don't know of anything that I can state under oath, no.

Q. There is some reference in some of the records to an Occident Investment Company. Was there ever any corporation in which Seattle Hard-

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ware Company was [10] interested known as Occident Investment Company?

A. No, there never was. There was a lot of confusion of names, just loose talk, you might say. We were not too very accurate about it, but there was never an Occident Investment Company. And it persists until this day, too.

Q. Do you know whether, after the transfer of the assets of Occident Trust Company to the Seattle Hardware Company in February, 1906, that the license fees of the Occident Trust Company were kept up or not? A. I don't know.

Q. You do not?

A. No, I don't know how long they were kept up. I know they were allowed to lapse after a certain time, but I don't know the dates.

Q. Did the Occident Trust Company do anything in connection with any business activity after transferring that property to the Seattle Hardware Company? A. Not that I recollect.

Mr. Jones: I think that is everything.

#### Cross-Examination

By Mr. Miller:

Q. Mr. Ballard, were you acquainted with Mr. Ira Bronson? [11] A. Yes, very well.

Q. He was attorney for the Seattle Hardware Company, wasn't he? A. He was.

Q. The deed to the lots 1 and 2 was first taken in his name? A. That's right.

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Q. And it was held in his name for some time thereafter, wasn't it?

A. I don't know how long, but there was a period of time when it stood in his name, yes.

Q. And then the property was deeded by Mr. Bronson over to the Occident Trust Company after a period of time, is that right?

A. That is correct.

Q. And then in February, 1906, the property was deeded to the Seattle Hardware Company by the Occident Trust Company?

A. That is when we moved into the new building, yes, sir.

Q. Now can you state when the new building was completed, approximately?

A. Well, off the record a minute. (Discussion off the record.) I would say we moved into the new building April 1, 1906.

Q. And then the building, I assume, had been completed [12] shortly before that? A. Yes.

Q. Early in 1906?

A. February, perhaps.

Q. So you received,—that is, the Seattle Hardware Company received title to the lots and the building about the time that the building was completed? A. That is it.

Q. Why was the property first placed in the name of Mr. Bronson?

A. He acted as our attorney and made the deal with Stetson Post. Stetson Post was a little tough

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to deal with, and any tough deal we turned over to our lawyers.

Q. Was the property carried in Mr. Bronson's name as attorney for the Seattle Hardware Company? A. Yes.

Q. Mr. Bronson, himself, did not own the beneficial interest in the property?

A. As far as I know, he did not.

Q. Now, he was one of the incorporators?

A. He was, yes.

Q. And the other two incorporators were Mr. Dana Brown and Lawrence Moore?

A. Yes, sir. [13]

Q. And who were those people?

A. Dana Brown—are you a Seattle man?

Q. No, I am not.

A. Well, I was going to make a comparison; but he was a representative of one of the local steamship companies,—ferry lines, and Mr. Bronson was their attorney, so we used Mr. Brown as one of the incorporators. Mr. Lawrence Moore was a partner in the jewelry business with Mr. Black who was a member of our company, and he and Mr. Black arranged with Mr. Bronson to use Lawrence Moore as a third incorporator.

Q. Now, those parties were not in any way interested? A. No.

Q. Now I think you testified that this Occident Trust Company was organized for the purpose of holding title to the lots? A. That's right.

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Q. And of course the building that was built thereon; and Occident was the trade name of the Seattle Hardware Company, wasn't it?

A. You mean as a trademark?

Q. As a trademark.

A. It was,—I don't believe it was that early that we adopted that as a trademark. However, Occident was representative of the west. [14]

Q. Had it been used by the Seattle Hardware Company as a trade name?

A. Yes. I don't know when we first began to use it. I am unable to state.

Q. Now your duties in the company, as I understand it, were mostly in the selling end of the corporation?

A. Buying and selling of builders hardware.

Q. And you were in charge of one of the departments of the company?

A. That's right,—at this time.

Q. At this particular time? A. Yes.

Q. When did you become secretary of the company?

A. The records will show that. I don't remember the exact date.

Q. It was after 1906, wasn't it? A. Yes.

Q. And you had nothing to do with the keeping of the books of the company? A. I did not.

Q. Or in the paper work that was done by the company? A. No.

Q. You were on the board of trustees of the Seattle Hardware Company? A. Yes. [15]

(Deposition of Roy P. Ballard.)

Q. But you were not on the board of the Occident Trust Company? A. No.

Q. Now did the Occident Trust Company,—did it have an office of its own? A. No.

Q. As far as you know did it have or keep any particular books separate and apart from the books of the Seattle Hardware Company?

A. Not that I know of.

Q. And you have never seen any of the stock certificates that were actually issued?

A. No,—if there were any issued.

Q. And when the property was turned over by deed in 1906—deeded back to Seattle Hardware, you didn't see any stock certificates cancelled at that time? A. No.

Q. Or surrendered by anyone or officially marked "cancelled" as a result of that? A. No.

Q. Now in that meeting that was held in 1906 that Mr. Jones asked you about,—February, 1906, which you attended,—a meeting of the trustees of the Seattle Hardware Company, it is noted that the deed to the property was not to be recorded for the present. Do [16] you remember that?

A. Yes.

Q. As a matter of fact, it was not recorded for about two years afterward, was it?

A. I don't know how long. Not for some time.

Q. Why was that that the deed was not to be recorded; do you know of any reason?

A. The only reason I can advance for that with

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any degree of certainty is that there were certain stipulations—contractual arrangements made with various firms for supplying material or doing work which was not completed. I can give you an example of that if you wish one.

Q. At the time, with Occidental?

A. Yes, in connection with the building.

Q. And the purpose of that was to avoid any liability on the part of Seattle Hardware on these obligations?

A. The contract was made with Occident Trust Company, and if that Company went out of business right away we might have difficulty in enforcing the contract. For instance, the glass specified in the building, all the window glass was to be triple-A glass.

Q. Yes.

A. And W. P. Fuller Company took the contract, —we considered them a reliable concern, and they were, and [17] when it came time to put in the glass they couldn't produce it, and we let them put in temporarily double-A glass, which they did. We held them to go ahead and complete their contract according to specifications. They tried for over a year and finally had to come to us and say, "We can't do it, the factories don't make it any more; and, will you compromise with us and we will settle it?" That is a sample of what I mean.

Q. Was it your purpose and intention to hold Occident open?

(Deposition of Roy P. Ballard.)

A. Until the building was actually completed and all the bills paid on it.

Q. And that took some time after 1906?

A. Yes, that's right.

Q. In fact, all of it was not wound up and completed until sometime in 1908, was it, or somewhere around there?

A. Probably around that time, yes.

Q. Now there were some old buildings on the land, these lots, when they were first acquired in 1901? A. Yes.

Q. Do you know who collected the rents on those old buildings?

A. Jones & McCoy were tenants, and ran a grocery store. [18]

Q. They paid the rents in to Seattle Hardware Company, didn't they? A. Yes.

Q. Who put up the money, if you know, for the purchase of Lots 1 and 2,—who advanced the money?

A. I haven't the slightest idea.

Q. You had no connection with that particular department? A. No.

Q. You are satisfied that Mr. Bronson didn't advance it himself?

A. Well, I don't think so. Lawyers aren't usually that dumb.

Q. Do you know whether it was advanced by the Seattle Hardware Company?

A. No, I don't.

(Deposition of Roy P. Ballard.)

Q. And do you know in whose name the fire insurance policies were carried on the property,—that is, on the old buildings that were on it?

Mr. Jones: At what time?

Mr. Miller: In 1901 and shortly thereafter?

A. I don't believe there was any fire insurance carried.

Q. (By Mr. Miller): They didn't carry any?

A. Just a bunch of shacks.

Q. Who handled the negotiations for the purchase of these [19] lots, Lots 1 and 2?

A. C. H. Black, F. W. Baker.

Q. They were officials of the Seattle Hardware Company?

A. Yes, and of the Occident Trust Company.

Q. Who handled the contract with the architect for the construction of the new building?

A. Actually I did, but theoretically Mr. C. H. Black did. I was the cub. I did the footwork for Mr. Black.

Q. Did you have a written contract with the architect?

A. Yes; not on a percentage basis, but on a lump sum.

Q. Do you know where that contract is?

A. No, I don't.

Q. And you do not have any copies of that contract, and you have never been able to find any?

A. No.

Q. And that was a contract with Mr. Wickersham? A. A. Wickersham.

(Deposition of Roy P. Ballard.)

Q. And you were appointed as a building committee by the Seattle Hardware Company?

A. That's right.

Q. And was the contract made in the name of the Seattle Hardware Company or the Occident Trust Company, if you know?

A. All the negotiations, as far as the public knew, were [20] Seattle Hardware Company, but we were acting for the Occident Trust Company.

Q. Do you remember how the contract was signed? A. No, I don't.

Q. Was the Occident Trust Company ever held out to the public in any way as a corporation?

A. No.

Q. Did its name ever appear in any telephone directories, as far as you know?

A. I don't think so; not that I know of.

Q. And it had no other duties except the mere holding of the title to this property?

A. That is my understanding.

Q. Did Occident Company have any salaried employees of its own except those that were already paid by the Seattle Hardware Company? There were no separate employees for Occident?

A. Of course, the foreman of the building,—the building construction, and all those people were employees of the Occident Trust Company.

Q. That is, they were paid for the construction of the building?

A. Yes. Do you mean permanent employees?

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Q. Yes.

A. No, not that I know of. [21]

Q. And they were paid pursuant to contract for the construction of the buiding?

A. That's right.

Q. Now, was it the intention, as far as you know, that as soon as this building was completed that it would be transferred back to the Seattle Hardware Company,—the property?

A. That was my understanding.

Q. It was your understanding, then, that Occident was to hold the title to the lots until the building was completed? A. That's it.

Q. And then the property was to be transferred back to Seattle Hardware Company?

A. At some time in the future; the exact date we didn't know.

Q. Was that all to be about the time the building was completed, as far as you know?

A. I don't think I would be able to identify that.

Q. Did you hear some talk or discussion of that at some of the previous meetings?

A. Yes, it was understood in a general way.

Q. It was understood that the holding of that property was to be temporary by Occident?

A. That's right. [22]

Q. And shortly after the building was completed it was to go back to Seattle?

A. That was my understanding.

(Deposition of Roy P. Ballard.)

Q. Were there any dividends ever formally declared by the Occident?

A. No, neither formally nor informally.

Mr. Miller: I think that is all.

### Redirect Examination

By Mr. Jones:

Q. Mr. Miller asked you about the matter of holding out to the public of the Occident Trust Company as a separate corporation. Was there any concealment of the Occident Trust Company's separate identity?

A. No. And I don't know whether Mr. Miller and I understand each other fully as to holding out to the public. What I meant was that we didn't want to use the Occident Trust Company's name around here in Seattle as if we were trying to camouflage or get behind it. When you come to holding out to the public, the Travelers Insurance Company from whom we borrowed the money is the public.

Q. Didn't you have a lot of business transactions with people in the name of the Occident Trust Company? [23]

A. Oh, a lot of them. But, when we went to execute those transactions it was not specifically stated, "Now, remember, you are dealing with the Occident Trust Company, you are not dealing with the Seattle Hardware Company." We went on the theory that was a fact that would naturally be

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brought out or developed as time went on. We were not trying to conceal it, neither were we trying to publicize it.

Q. Do you know of the reason, if there was any, for withholding the filing of the deed from Mr. Bronson to the Occident Trust Company?

A. No.

Q. Or withholding of the filing of the deed from the Occident Trust Company to the Seattle Hardware Company?

A. Well, I stated a possible reason for that. On claims, or unfinished contract—I thought maybe that had something to do with it.

Q. I would like to know whether you know about that or whether that is your present supposition.

A. Well, I know that,—I know of a controversy with W. P. Fuller & Company, because that was quite active, and I remember one or two minor claims in an unfinished state, but my special personal knowledge of the others, other than Fuller,—I do remember [24] that, because I helped make the original deal with Fuller & Company.

Q. All I wanted to get at was this: When the transfer was made from Occident Trust Company to Seattle Hardware Company in February of 1906, did the Occident Trust Company have any other property or assets left after that time?

A. No, not to my knowledge.

Q. Was there any change then in the handling

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of the building and property account as a result  
of that transfer?

A. Now you are talking bookkeeping and I  
don't know how they kept the books.

Mr. Winters: The books would be the best evi-  
dence.

Mr. Jones; Yes, that is probably right.

Q. (By Mr. Jones) There was one other thing  
you said in answer to Mr. Miller's question, about  
there being, as you recall it, some understanding as  
to the time when the lots and building would be  
transferred from Occident Trust Company to the  
Seattle Hardware Company; what do you recall  
specifically of any such arrangement or under-  
standing?

A. Merely the fact that we considered the Occi-  
dent Trust [25] Company a holding company; not to  
be mixed up or confused with the Seattle Hardware  
Company operation in any way. There was no  
object in further continuing to use the Occident  
Trust Company except in connection with something  
on real estate which we didn't have,—at that time  
we didn't have anything othe rthan this one piece  
of property.

Q. What discussion, if any, was there as to  
when the real estate would be transferred to the  
Seattle Hardware Company? Do you have any-  
thing definite in mind as to that? A. No.

Q. You said in answer to Mr. Miller's questions  
that, in fact, the holding of the property was to

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be merely temporary and that it was to be transferred back to the Seattle Hardware Company at some time. What I would like to know is what specific discussion or consideration can you now recall on that subject?

A. None other than the fact that that was a land company or real estate holding company, and as I said before, was not to be confused in any way with operation of the Seattle Hardware Company. The Seattle Hardware Company was incorporated as a hardware store, and as soon as it took title to the property and there was no longer any confusion as to construction or [26] real estate matters, then the Occident Trust Company would cease to function and the Seattle Hardware Company would carry on.

Q. And when, as you understand it, did that time come?

A. Well, I think the minutes will show when we made a settlement with W. P. Fuller, and it was shortly after that. That was the last, no doubt,—we had a tough architect—a toughy,—and he hung on like a bulldog until we got that settled. After that I don't remember anything else that made it necessary to hold out.

Mr. Miller: I would like to have you complete your answer.

A. (Continuing) Probably that was 18 months to two years after that. But the records will show when that settlement with Fuller took place.

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Q. (By Mr. Jones) Did the Occident Trust Company in fact engage in any business transactions after it conveyed the property in February of 1906? A. Not to my knowledge.

Mr. Jones: I think that is all.

### Recross-Examination

By Mr. Miller:

Q. Did the Seattle Hardware Company own any other real [27] estate at this particular time?

A. The Seattle Hardware Company?

Q. That's right.

A. Not unless they took it in on a bad debt or something like that.

Q. I call your attention to a receipt for the payment of taxes for the year 1903.

(Documents marked Defendant's Exhibits 1 and 2, deposition of Roy P. Ballard.)

Q. (By Mr. Miller) I want to show you, Mr. Ballard, receipts from the Treasurer's Office of Seattle, King County, Washington.

A. To whom?

Q. Made out to Mr. Baker, showing payment of taxes on four pieces of property in addition to the Lots 1 and 2 here involved. Would you look at this and tell us what those lots were?

A. Seattle Tide Lands are the first two on there, and then there is Kent,—Kent and Burk's Addition,—Burk's Second Addition, I guess it is and I don't know what that next one is. That was

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evidently not acquired intentionally because the valuation of the whole piece is less than \$300. [28]

Q. Were those lots that you took in some sort of mechanic's lien foreclosure or bad debts?

A. Bad debts. I think Mr. Baker was treasurer of the company and handled the bad accounts.

Q. And those lots were never turned over to the Occident Trust Company?

A. Oh, no.

Mr. Jones: Pardon me, did he testify that those lots, other than one and two, belonged to Seattle Hardware Company?

Mr. Miller: Well, he didn't testify to it.

A. I don't know if they did,—but we paid the taxes.

Q. (By Mr. Miller) But you are not certain whether they belonged to Seattle Hardware Company?

A. No, we might have paid the taxes to protect our claim.

Q. Now the same thing is true as to the lots appearing on Defendant's Deposition Exhibit No. 2 relating to certain lots in Kent's Nob Hill Addition?

A. Kent is a little town about halfway between here and Tacoma.

Q. And to the best of your knowledge those were payments, either to protect your rights in those lots or payments on lots you had taken in for bad debts?

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A. That is correct. [29]

Mr. Miller: Well, we won't introduce them now, but we probablly will at the trial. That's all.

### Redirect Examination

By Mr. Jones:

Q. Do you know whether the payment of taxes by Mr. Baker on the tracts that Counsel was just asking you about had anything to do with Seattle Hardware Company?

A. No, only that they put them both on the same tax receipts. Mr. Baker, if he was doing it for his own personal account, wouldn't be likely to confuse them with Seattle Hardware Company. It wouldn't be good business. He would want his own separate receipts.

Q. As far as you know, what was the interest of Seattle Hardware Company or its relation to these tracts in Kent's Nob Hill Addition or Burk's Addition or the supplemental plat of Burk's Addition?

A. No relation that I know of. I am unable to state any position the Seattle Hardware Company had in the picture.

Q. Mr. Baker was quite a prominent business man, as I understand it? A. Yes.

Q. And he may have owned property in his own name, is [30] that correct?

A. He might, but that district doesn't indicate that.

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Recross-Examination

By Mr. Miller:

Q. He was also treasurer of the Seattle Hardware Company?

A. Treasurer of both the Occident Trust Company and the Seattle Hardware Company.

Q. And these receipts also covered Lots 1 and 2 here? A. Yes.

Q. Do you know where the money was procured from which the taxes were paid? Was that money of the Seattle Hardware Company?

A. I haven't any idea.

Mr. Miller: That is all.

Mr. Jones: I think that is all.

(Witness excused.)

/s/ ROY P. BALLARD.

Notarial Certificate [31]

State of Washington,  
County of King—ss.

I hereby certify that on the 4th day of May, 1948, at 9:30 a.m., at Doctors Hospital, Seattle, Washington, before me, Bruce Moburg, Notary Public in and for the State of Washington, personally appeared the witness, Roy P. Ballard, on behalf of Plaintiff;

That H.B. Jones, Esq., and A. R. Kehoe, Esq., were present and interrogated said witness on behalf of Plaintiff;

That Homer R. Miller, Esq., was present and interrogated said witness on behalf of Defendant;

That said witness was by me duly sworn and put on oath to testify the truth, the whole truth and nothing but the truth, whereupon said witness, upon examination, under oath, deposed and said as in the foregoing, annexed deposition;

I further certify that the testimony of said witness was taken stenographically by men and that the said deposition thereafter was transcribed under my direction;

I further certify that after the testimony of said witness had been fully transcribed, the said deposition [32] was submitted to said witness for examination and was read to him or by him, and that any changes in form or substance which the witness desired to make were entered upon the deposition by me, with a statement of the reasons given by the witness for making them, and that the deposition was thereupon signed by said witness;

I further certify that the said deposition is a true record of the testimony given by said witness.

I further certify that all objections which may have been made at the time of said examination to my qualifications or to the manner of taking said deposition, or the evidence presented, or to the conduct of any party, and all other objections to said proceeding, have been noted by me upon said deposition;

I further certify that I am not a relative or

employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in said action or the outcome thereof.

I further certify that I am herewith securely sealing said deposition in an envelope endorsed with the title of the above cause, and marked, "Deposition of Roy P. Ballard," and promptly sending it to the Clerk of the United States District Court at Tacoma, Washington. [33]

In witness whereof, I have hereunto set my hand and affixed my official seal at Seattle, Washington, this 5 day of May, 1948.

[Seal] /s/ BRUCE MOBURG,  
Notary Public in and for the State of Washington,  
residing at Seattle.

[Endorsed]: Filed May 5, 1948. [34]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1059

SEATTLE HARDWARE COMPANY,

Plaintiff,

vs.

CLARK SQUIRE, Collector of Internal Revenue,  
Defendant.

#### TRANSCRIPT OF PROCEEDINGS

Be it remembered that on the 4th day of May, 1948, at the hour of 2:00 o'clock P.M., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States at Tacoma, Pierce County, Washington; the Plaintiff appearing by Messrs. Jones & Bronson (by Messrs. Harry B. Jones and A. R. Kehoe), and the Defendant appearing by Homer R. Miller, Special Assistant Attorney General and Thomas R. Winter, Special Assistant to Chief Counsel.

Whereupon the following proceedings were had and done, to-wit: [2\*]

Mr. Winter: If the Court please, may I introduce to the Court, Judge Leavy, Mr. Homer R. Miller, Special Assistant to the Attorney General

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\* Page numbering appearing at foot of page of original Reporter's Transcript.

of the United States, and I move his admission for the purposes of this trial.

The Court: He may be admitted.

Is the Plaintiff ready to proceed?

Mr. Jones: First of all, Your Honor, I want to express our appreciation of your readjusting the calendar. We had a very unfortunate situation develop. Mr. Ballard, who is quite an elderly man, who was to be a witness in the case, had a bad fall Friday, and it developed over the week-end that it was a fracture of the pelvis or something of that kind. They've got him all strapped up on a board on the bed. And it wasn't hardly possible to take his deposition yesterday without crowding the thing, so we have done that today and it is being transcribed and will be available, I think, tomorrow.

The nature of this case is such that I imagine that Your Honor will want to take the case on briefs anyhow; I know Mr. Miller would [3] like to have it submitted in that way, and I—I really believe, from the study that I have made of it, that it's the only way that the case can be properly taken, because it's one of these rather technical tax cases that has to be considered in the light of special statutes and decisions.

And we will have that deposition certainly the day after tomorrow, possibly tomorrow.

The Court: I have gone through the pleadings here, and the allegations made in paragraphs one, two, three and four, are admitted, and the admission of paragraph four takes out of the case very

largely the issue of determining figures, because the amount involved here—

Mr. Jones: Well, yes, we have—we have been working on this case; while Your Honor hasn't had any pretrial conference, we've gone right ahead with a pretrial conference between ourselves; we've worked out a stipulation that Mr. Miller had written and will submit now, and also a pretrial order which will—I don't know whether it will clarify the thing very much, but at any rate, it will reduce it down to a very definite basis. [4]

The Court: I will be glad to have it, because there is here a denial in paragraph five and six, and doubtless there are some facts alleged there that are not in dispute.

Mr. Miller: We will tender a brief pretrial order, Your Honor. It has been approved by both plaintiff and defendant; and also a stipulation covering some of the facts in the case, which we would like to have filed and made part of the record.

The Court: I'm going to sign this pretrial order as submitted, and it will be filed and the case will be tried upon the issues as made therein.

Now, let me ask first—I'm going to give you both an opportunity to make some statements so that I can more fully familiarize myself with this controversy—but it appears from the original pleadings that I have read and now, likewise, from the pretrial order, that it hinges substantially around the situation in reference to the property acquired

by a subsidiary corporation some thirty, forty years ago, and the values that were placed upon it.

Mr. Jones: We have stipulated [5] on the value. That was one issue that—that threatened to take a good deal of time, was the question of valuation of the real estate and the building at the time of transfer to the plaintiff company; but we spent some time in going over that and sat down and talked it out, and we have agreed on that value, the values of both the land and the building, as of the time of the transfer.

The Court: And then is there another issue of fact here as to the—where the true ownership of the property rests?

Mr. Jones: I don't think that there is any issue as to where the legal title rested, but as I understand defendant's position, which has been made clear in the—in the statement of contentions, it is contended that that is not a real ownership on the part of the Occident Trust Company, but simply a sham or fictitious ownership; and that, I assume, is a question of fact that will have to be decided.

Mr. Miller: I think we can make our position clear on that in our opening statement, a little later on. That is one of our contentions that we make in substance.[6]

The Court: Very well, I'll be glad to hear from you.

Mr. Jones: I have prepared, or Mr. Kehoe had, a trial brief, but I think it might be confusing to file it at this time because when we prepared it we

prepared it before Mr. Miller was here, and simply on the pleadings as they existed, without statement of contentions and before the matter of valuation was determined; and unless Your Honor wants to take this with those limitations and knowing that it really isn't appropriate, I—I will not file it because I think that we can simplify the matter much more if we can defer the filing of our brief until the case is submitted.

The Court: I'll permit you to do that.

Mr. Jones: I think it would be more satisfactory.

Now, this case involves a claim for refund of the plaintiff, to income and excess profits taxes alleged to have been overpaid for the fiscal years ending November 30th, 1941, -2, -3, -4 and -5. The claim has not been allotted; it has not been denied officially, but more than [7] six months expired, so a suit was started and it is admitted by the defendant that claims as attached to the petition, or complaint, were filed and have not been acted on.

The issue for the year ending November 30th, 1942, is to be removed from the case by reason of the statute of limitations. The Supreme Court recently decided that the four year statute is not applicable, and in view of that decision, the claim for refund was not filed within the statutory time as to that particular year. It does not involve a very large amount; but whatever it is, it's out of the case. The—that has no effect. That was just one of four or five years which involved the same

situation; it has no effect except in the determination of the amount.

Now, we have also agreed that while this case presents quite a number of—of problems set up in the form of figures, that really that I think there is nothing for Your Honor to decide that involves mathematics or computations at this stage. The problem is one of principle as to what is the basis to this plaintiff for the property that's involved here, [8] and if Your Honor decides that the plaintiff is right, but the basis is the value at the time it was conveyed to it in 1906, then the matter of the application of that basis is simply a matter of computation and we have agreed in our stipulation that that question is reserved for future disposal, that is, the parties will submit—they'll agree on the computations amongst themselves.

Now the case, as I say, involves both income and excess profits tax liability. The income tax liability is involved only for the year 1945, because in that year the plaintiff sold this lot—these lots and this building that are involved here; but for the other years, the question also—the question that's involved, as well as for 1945, concerns the excess profits credit, and the computation of the excess profits tax, and that in turn depends upon the determination of the principle to be applied to what is known technically in tax law as the basis for this property.

Now the facts in the situation, I think I might outline very briefly, as they will be presented to

you, are these: Seattle [9] Hardware Company is a concern, as the name implies, engaged in the wholesale hardware business in Seattle since 1885.

In 1901 Mr. Ira Bronson, who was then attorney for the Seattle Hardware Company, formed a corporation known as the Occident Trust Company. The other incorporators were two parties not directly connected with the Seattle Hardware Company, Mr. Dana Brown and a Mr. Lawrence Moore. Capitalization of that company was a hundred thousand dollars. The record shows that at the same time, or approximately the same time as the company was formed, Mr. Bronson acquired for a stated consideration of sixty thousand dollars, the Lots One and Two of Block 327 of Seattle Tidelands, that are in controversy here.

Immediately—and at the first meeting of the Occident Trust Company, the organization meeting, turned those lots into the company at a fair value of a hundred thousand dollars in payment for all of its capital stock. It would appear that in acquiring the lots he had acquired them for sixty thousand dollars. That's the consideration recited in the deed to him; but he turned them in to the Occident Trust [10] Company for a hundred thousand dollars of capital stock.

Immediately, the three organizers, Mr. Bronson and these other two parties, Dana Brown and Lawrence Moore, resigned; and in their place, as trustees, there were elected Mr. Ballard, the father of the witness I mentioned, Mr. C. H. Black and Mr.

F. W. Baker, who were the three leading and principal executives of the Seattle Hardware Company.

The evidence will further show that the Seattle Hardware Company contemplated that this Occident Trust Company would hold the title to these lots and would cause a building to be erected on them, suitable for the tenancy of the Seattle Hardware Company, and that at some time after that was done they probably would dispose of the Occident Trust Company and take over the property themselves, but that they desired, for reasons of their financial status and their balance sheet appearance and relations with their bank and so forth, not to encumber the Seattle Hardware Company with a real estate corporation, to keep that out of the hardware company and conduct it as a separate corporation. [11]

The deed to Mr. Bronson was not recorded for some time. I don't know but the record would show the date when it was recorded. The property, Lots 1 and 2, at that time was just part of the tidelands of Seattle. That was just before the big real estate boom, or the railroad boom in that area; and at the time they acquired it, the property was occupied by some more or less dilapidated buildings, they produced some rental and they incurred a good deal of expense.

The transactions, or the financial transactions of the Occident Trust Company with relation to the management of the property, the collection of the rents and the payment of expenses, are all recorded

in an account on the books of the Seattle Hardware Company entitled "Occident Investment" or "Occident Trust Company," they used the term "investment" at times, but it was at all times this one account of this company, this Occident Trust Company; and they record the receipt of the rents and the payment of repairs and that sort of thing.

Along in 1904 a building was [12] commenced, the Seattle—the present Seattle Hardware Company building, which is a seven story and basement building, and is still used by them.

The contracts for this building, we—we will have a large number of bills and vouchers and bonds, guaranty bonds and so forth, performance bonds, to show that they were all handled in the name of the Occident Trust Company. The building was built in the name of the Occident Trust Company, and in the course of its building and for the financing of it, the Occident Trust Company borrowed a hundred and fifty thousand dollars and gave a note and mortgage on this property to secure the construction loan. The note was signed also by the Seattle Hardware Company, and it possibly was signed or endorsed by some of the individual stockholders.

The testimony says that some of the stockholders did endorse the note. We have been unable to locate the original note. We did have it some time ago and its been misplaced; we haven't yet been able to relocate it. [13]

Now we have—strike that.

The question of who put up the money to acquire

these lots, or of just how the purchase price or the acquisition of them was handled, is obscure and frankly none of us can figure out just how that transpired. We don't think it makes any difference in this case, but we are unable to tell whether Mr. Bronson put up the sixty thousand dollars himself or whether some of the stockholders of the Seattle Hardware Company advanced it to him, or whether he obtained a loan from a bank, or whether he bought the property on deferred payments; but be that as it may, the property came into the hands of the Occident Trust Comany in satisfaction of its capital stock; and at a stage in 1904, as I recall the date—

The Court: Then Mr. Bronson received all of the capital stock of the corporation?

Mr. Jones: Yes, Your Honor. Yes, Your Honor. Apparently he received—it—it was paid in in exchange for all of the capital stock of the corporation.

Along in 1904 the property—the [14] books of the Seattle Hardware Company, in their account with the Occident Trust Company, reflect a valuation on the stock of the Occident Trust Company of a hundred and twenty thousand dollars, which is apparently the original sixty thousand dollars of the cost of the property, plus a sixty-thousand-dollar figure of appreciation.

Again in 1906,—at the critical date here, or just within a few days of it, appears a further entry on the books of the Seattle Hardware Company,

which in contemplation of the liquidation of the—or transfer of the property from the Occident Trust Company to it, recites that the value of the property has increased to two hundred and twenty-five thousand dollars, and they issued against that another hundred thousand dollars of capital stock of the Seattle Hardware Company, treating it then as if they had received from the Occident Trust Company the title to this building and issuing to their own stockholders a hundred thousand dollars more of stock for appreciation. That got the property up to two hundred and twenty thousand on their books. They referred to it as two hundred and twenty-five thousand, and that apparently was either an error [15] in making that reference or an error on their part in not issuing stock up to that point.

Now that—that value was a bona fide value as is evidenced by the fact that the Government has stipulated with us here that the value as of that date was two hundred and twenty-four thousand some hundreds of dollars.

Now at that time, February of 1906, the building had been finished, or practically finished. There were some odds and ends of unperformed commitments that hadn't been entirely disposed of, but substantially it had been finished and the Seattle Hardware Company occupied the building about that time.

The building showed on this Occident Investment Company account, or Occident Trust Company

account, a cost of two hundred and forty-four thousand dollars. Due to various circumstances that I don't need to go into, that cost did not reflect the true value of the building, and the Government has stipulated with us in the case that the true value of the building was approximately two hundred and seventy thousand dollars; so that that, together with the value of the land, made a total value on land and building [16] of around two hundred and—of four hundred and ninety-five thousand dollars.

On February 20th, I think it was, it may have been the 19th, I think it was the 20th, of 1906, the records of the Seattle Hardware Company show that a meeting was held at which time it was recited that it was decided to transfer the assets of the Occident Trust Company over to the Seattle Hardware Company; and thereupon at that time a deed was given, transferring the land and the building to the Seattle Hardware Company. The Occident Trust Company from that time on did no more business, except possibly to the extent of—of still acting as—as the contracting party on some of these accounts which had not been settled; some of the building accounts in the construction of the building that had been performed but were in dispute, still had to be ironed out; but the Occident Trust Company did not engage in any business after that time, it had no other assets than those that it transferred to the Seattle Hardware Company, it paid no further license fees to the state, and in

course of time, under the practice and the law in 1909 it was stricken by [17] the Secretary of State for failure to pay its fees.

Now our position is that under the tax law, and I'll refer to this again in detail a little bit later, that we are entitled to take the fair market value of the land and building at the time of the transfer to the Seattle Hardware Company, as basis. The plaintiff company, in its returns for excess profits tax purposes, in 1940 I think it was, had—I may—I may be in error in this—it's not material to the case, except to give Your Honor the background of the way this case comes up, and I think I am stating it correctly.

They had made their return for excess profits tax purposes, on the basis of being entitled to invested capital of two hundred and twenty thousand dollars, because of that figure for the real estate that appeared on the books. They had allowed the building, I think, to stand at the two hundred and forty-four, less adjustments that had to be made for depreciation.

The agent's office, on audit, disallowed the invested capital item or credit as claimed of two hundred and twenty thousand dollars [18] and reduced it to sixty, and said in effect that because the property only cost the Occident Trust Company which it, the agent said, "Well that in effect is the same as Seattle Hardware Company, and so we just disregarded the Occident Trust Company and we regard the cost of that as sixty thousand dollars instead of two hundred and twenty."

Now having made that ruling, and as I think—I think it was for 1940, the plaintiff by reason of that, then made its return for '41 and subsequent years, on that basis. I mention that simply to show that this present suit is not an afterthought that didn't come up until after all of these things were over, but that the plaintiff originally claimed substantially the basis as it now claims, but because of the agent's refusal to recognize that basis for invested capital purposes, it then made its returns for the years that are involved in this suit on the basis of the sixty thousand dollars credit instead of the two twenty, and then filed these claims for refund; asking invested capital credit on the larger basis of two hundred and twenty thousand.

Now in 1945, the plaintiff sold the land and the buildings. There—there had been [19] in 1918 a purchase of an adjoining lot and another small building put on that, so that from the figure standpoint the transaction in 1945 included an additional lot and an additional building.

Well, along with it, it sold the original lots 1 and 2 and the building that I've been talking about; and the sale price was less than the basis adjusted for depreciation, and the plaintiff claims in addition to the invested capital adjustment for 1945, it claims also a loss based on that difference in—between the basis and the selling price.

Now, if I may just go into the technical side of it a little bit, we will cover this, of course, on the briefs, but I think it might help if I explained a

little bit more of what we're getting at in this basis.

The Court: Let me ask you there, what consideration you stated, did the Seattle Hardware pay for—paid to the Occidental Trust Company, was a certain amount.

Mr. Jones: No, the—

The Court: Was it actual consideration—

Mr. Jones: No. That was one of [20] the things that I was going to go into, and I'll answer that right now and then probably touch on it again.

The consideration that the—the Seattle Hardware owned all of the stock of the Occident Trust Company. It—it acquired all of that stock, presumably by transfer from Mr. Bronson. It shows up on its books as the owners of all that stock; and in liquidation, under the statute and the decisions, the liquidation of a corporation is an exchange of its assets for—with its stockholders for the stock which they hold, and the stock which they hold being extinguished by the liquidation, or being rendered valueless by the transfer of all of the assets of the corporation, is regarded as a thing that is given in exchange for the assets; and in a case of this kind where there is no free market for the stock, so that you can't have a market value for the stock of the Occident Trust Company, both the statute, as applicable to 1913 valuations, and the decisions as applicable to all situations, recognize that that stock is to be valued by finding the value of the assets of the corporation which—whose

assets are transferred in exchange for the [21] stock. In other words, the stock represents the assets and the assets represent the stock, and if you can't—if you haven't any dealings in the stock so as to determine its value, you determine the value of the assets.

Well here, we have determined the value of the assets by a stipulation, so that they represent the value of the stock; and when the Seattle Hardware Company received the assets it either gave up its stock—the evidence will show that we can't find the stock certificates, we don't know just physically where they are—but when they took over all the assets of the company, of course they extinguished any value in the stock which they represented, so they in effect gave up the stock, which was of the same value as the assets. So that is the consideration that they paid.

Now that is really the point of the case. Your Honor has put your finger right on the real point of this case. I—I'm not going to try to go into the statutory provisions and distinguish them, because fundamentally they—most of them relate to transactions, of course, after February 28, 1913, when the law became [22] effective; but still we do have certain statutory concepts that deal with exchanges and bases prior to 1913.

Now, Section 111 of the Internal Revenue Code, says that for the purpose of determining loss, that is the loss by the Seattle Hardware Company of—on its sale in 1945—

The Court: How do you cite that in U.S.C.A.?

Mr. Jones: The Section a hundred and—in—well, I can't tell you in U.S.C.A., but we will put U.S.C.A. citations in our brief.

The Court: I was just wondering how that—

Mr. Jones: Yes, all right, we will do that.

The Court: I'm none too familiar with the Internal Revenue Code.

Mr. Jones: Well, that—that is now a basic code which carries through from year to year, so that you don't have to deal with the Revenue Act of '42 or '48, or whatever the year happens to be.

Section 111 says that for—that the loss on the disposition of the property shall [23] be the excess of the adjusted basis provided in Section 113b, for determining loss over the amount realized.

Now, 113b says this, that the adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired—and that relates to both before and after 1913—shall be the basis determined under subsection (a) adjusted as hereinafter provided.

Now the adjustments are for depreciation and additions and so forth, and those are not in controversy. We will agree on those.

And subsection (a), which I have just referred to in 113b, says that the basis unadjusted shall be the cost of such property with certain exceptions. There follow certain exceptions, twenty-two exceptions, but none of those exceptions, in our opinion, is applicable to the situation here. Now I don't think Mr. Miller will agree with that a hundred per cent. I

think he is going to take the position that one or possibly two of those exceptions, is applicable. We think that they are not applicable [24] exceptions and we will present the reasons why; but our position is that the basis in this case is cost, that cost is the value of the stock of the Occident Trust Company, which Seattle Hardware Company lost when it took over the assets of Occident Trust Company, and that the value of the stock under the decisions and the statutory provisions is determined by the value of the assets, so that the hundred per cent of the stock is measured by the stipulated value that we have here; and that that then has two effects, that it establishes a cost for this property, the land and the buildings, of four hundred and ninety-four thousand dollars in 1906, and that after making adjustments for the depreciation which the building sustains after that time, under the statute and on which there is no dispute, that we then arrive at a figure which is substantially in excess of the amount it realized on the sale of the property and it's therefore entitled to the difference between those two, as loss.

We further take the position that by that transaction the Seattle Hardware Company realized a gain equal to the difference between its dollar cost of the stock of the Occident Trust [25] Company and the value of the assets which it received from the Occident Trust Company, and that that becomes a part of its earned surplus, and is therefore to be considered in the determination of invested capital.

Now those are technical—this—this whole concept of both basis for gain or loss, and invested capital, is a very technical one. It must be determined strictly with reference to the statutory provisions and interpretations placed on those in the cases; and I think it would not particularly help Your Honor for me to try to—to argue those more in detail now; but what we contend for here is a finding by the Court that this subsidiary company was liquidated, or the property taken over—I don't care whether you say it's liquidation or—or just a transfer by way of a dividend, it comes to the same thing either way, but we speak of it as a liquidation because the company, Occident Trust Company, didn't do anything more after that—and that the value of the properties received by the sole stockholder, being a distribution of the entire assets of the subsidiary company, must be taken as a realized completed transaction at that time and governs [26] for excess profits and gain or loss purposes.

Now, in the presentation of this matter there are two problems: one is the income problem, and the other is the excess profits.

I have undertaken to cover, myself, the—the valuation problem and the income angle of it. The valuation we have disposed of, so I have only the income left.

Mr. Kehoe has given most of the time on our part, to the excess profits angle, and I would appreciate it if, to the extent that I don't cover anything, he may be permitted to present that to Your Honor,

either on examination of the witnesses or citation of our position. I don't think that there'll be many things that I won't cover; but if I don't do it, I would appreciate allowing him to do that.

Is there anything that you want to add to my statement, Mr. Kehoe?

Mr. Kehoe: Your Honor, there isn't anything to add. Our position is that—the basis for purposes of gain or loss controls in the invested capital issue, and if the Court holds that we're entitled to the basis for one [27] purpose, we get it for the other; and that will be covered rather thoroughly in the briefs, Your Honor.

Mr. Miller: As counsel has stated, this is a suit for refund for about two hundred thousand dollars, for the years '41 to '45, inclusive, fiscal years ended November 30th.

It is stipulated that there is no issue as to the year '42, because their claim is barred by the statute of limitations.

The Court: Well, isn't '41 also barred then?

Mr. Miller: No, '41 is not barred. '41, '43, '44 and '45 are open, but there—'42 was barred by reason of the fact that the claim—that the suit was not filed within the statutory period from the date that the claim for refund was filed.

The Court: But it was filed for '41?

Mr. Miller: Yes. Apparently the claim for '41 was filed later than the claim for '42, therefore '41 is still open.

Mr. Kehoe: Mr. Miller, if I might break in,

I can explain that. There was a [28] deficiency paid for 1941, Your Honor, at a much later date, and for that reason——

The Court: Oh, I see.

Mr. Miller: That's right. I didn't remember that.

Now, in brief, I think we can sum up the contentions of the parties. The year 1945 involves a loss on the lots 1 and 2 in—we will refer to them as lots 1 and 2, they are lots 1 and 2 in Seattle Tidelands, and there was a loss on those lots and the buildings. It's just a question as to how much that loss amounted to; and that goes back to the question of the basis—of the proper basis for the loss, and the building built thereon.

If, as the Government contends in this case, the Seattle Hardware Company in substance and within the authorities, and as a matter recognizable by the courts in determining tax matters, acquired these lots back in April, 1901, then the Government would be entitled to recover in this case, because they had been allowed the cost of the lots in that and the cost of the construction of the building and actual outlay and the actual money which the Seattle Hardware [29] Company put out for the lots and building, the construction of the building, have already been allowed.

If, on the other hand, it should be held that the Occident Trust Company was the party that acquired the lots back in 1901, then we have some different problems, and a number of problems that will have

to be settled; and I think the sustaining of the Government's contention on any one of these problems would resolve the case in the Government's favor.

And the same thing is true—the same question runs through the case with reference to invested capital, except that there are some other questions relating to the invested capital credit, which we have a couple of other contentions which we will raise that are not present in determining the loss on the land and buildings.

Now the principle—one of the main contentions in this case, relating to the land and building, is whether in substance and fact, the property was acquired by the Occident Investment Company, or whether the Occident [30] Investment Company was just an instrumentality, agency or nominee without any purpose or duties except the holding of title to property, and whether in fact and in truth, the Seattle Hardware Company purchased the lots itself, kept the title in the subsidiary as a convenient agency or instrumentality with the view to have it turned back to the Seattle Hardware Company just as soon as the building was completed.

I might say to Your Honor in the beginning, that this morning the plaintiff took the deposition of Mr. Ballard, who is now secretary of the company, the Seattle Hardware Company. He is an interested witness in this case, financially. He's a stockholder. He was a young man at the time that these transactions occurred, and was reasonably familiar with all of those transactions. He was a very fair

and in my opinion a very honest witness. I think his testimony was such that it can be accepted, as far as maybe making allowances for some things that he himself states that he did not entirely remember, but I think he honestly and fairly tried to tell the truth about it as he remembered it. [31]

And I think that his testimony in this case will very well disclose the purpose of this subsidiary and the reason that it held the title to the property.

The Seattle Hardware Company was a wholesale hardware company that was—the business was expanding at this time, back in 1901. It didn't want to have real estate carried in its name, because it was a hardware company. It was not a company that was engaged in building real estate; so it created this subsidiary just as a holding company, to hold the real estate until the building was completed. Mr. Ballard so testified.

The property was acquired by Mr. Bronson, who was the attorney for the Seattle Hardware Company.

The Court: I assume he is probably the father of the present Mr. Bronson, or is it Mr. Bronson of your firm, Mr. Jones?

Mr. Jones: No, he was the father of Mr. Bronson who is in the firm, but who is no longer—Mister—the present Bronson died in 1909. Ira Bronson came to Seattle, I think, about 1889 and died in 1939. [32]

Mr. Miller: That was my understanding.

Mr. Jones: Yes.

Mr. Miller: Mr. Bronson—and one of the other reasons why I think that the, and Mr. Ballard so testified, this property was acquired from Post and Stetson Mill Company, and it was a pretty tough proposition in buying the lots from these holders at that time because they were—I don't know whether they were Scotch or not, but they were difficult to deal with. So, Mr. Bronson took the title to the property in his own name, and he held it in his name for two years and a half, after title was taken. It was not turned over to the Occident Company until October, 1903.

Now, there was a statement made in the—by counsel, that it couldn't be determined from examination of the books and records and available data as to whether Bronson paid for the property or whether Seattle did. I don't think Your Honor will have the slightest difficulty in determining that question. Bronson had no interest whatever in this property. He was merely a nominee, Ballard so testified, and the [33] books and records will disclose it, and I don't think there can be any serious contention that Bronson was the man that bought the property.

The Court: But that is one of the contentions here, is it not?

Mr. Miller: I don't think so. I don't—I don't think that they are going to contend—

Mr. Jones: I don't—I don't expect to introduce any evidence to show that Mr. Bronson bought it with his own funds. I don't think that anybody

can determine just how the money was supplied; but I don't expect to contend that he bought it with his own money.

The Court: But you would not be prepared to stipulate that the funds for the purchase of the property, initially in 1901, were funds of the Seattle Hardware Company?

Mr. Jones: I can't determine that fact. I don't know whether they were, or whether they were the funds that may have been supplied by private stockholders—

The Court: Well, I just asked you because it seems to me—

Mr. Jones. —or they may have [34] been acquired from a mortgage. In my opinion, it's immaterial.

Mr. Miller: Well—the records—I might say the books and records of the company disclose a sixty-thousand-dollar item at this particular time, indicating that the Seattle Hardware Company expended the funds. I think we can trace that figure through and show that their books and records so show it.

Now that brings us down to October, 1903, and up to that time Bronson had held the property.

The Occident Company was organized in April, 1901, by Bronson and two other parties who were merely selected as incorporators to fulfill the statutory requirements, they were not connected as—directly—had no direct interest in it, as Mr. Ballard testified.

This property was acquired and the deed was taken by Bronson four days after Occident was incorporated, yet Bronson held the title during all this time himself.

Now the Occident Company never had any—

The Court: And that is the deed [35] that was not placed of record?

Mr. Miller: How is that?

The Court: Was the deed not placed of record in 1901?

Mr. Miller: The deed—the deed was placed of record in 1901, and it was placed of record in 1903; but in February, 1906, it was deeded by Occident over to Seattle. The evidence will show that the minutes of the trustees of Seattle stated that the deed was not to be recorded but was to be held by Seattle, for the present, and Mr. Ballard gave his explanation of that in his testimony; and that deed was not recorded until sometime in 1908; and the reason for it was that—that according to Mr. Ballard, that there might be claims come up concerning the erection of the building, claims against the contractors, and they wanted to hold the matter open till 1908 so that if any suits had to be brought they could be brought in the name of Occident, instead of in the name of Seattle.

Now, the evidence will show that Occident never kept any books, as far as we can show. All of the taxes on the property were paid by Seattle, while the property was held by Bronson, [36] Seattle's treasurer paid the taxes, took receipts in the name,

and then there was an account on Seattle's books on which Occident was charged or credited with these items, but Occident never kept any books itself. And as far as we can find out, and Mr. Ballard says he never saw any, there was never any stock issued, stock certificates issued. There certainly was never any turned in for cancellation on the—on this—under this so-called liquidation. There was never any dividends paid, the company was never held out to the public as being a corporation.

And Mr. Ballard testified that the reason for its incorporation and its sole duties was the duties of holding the title to this real estate. It had no other assets, no other functions.

Then along in 1904 they started the construction of a new building on the property, and the Seattle Hardware Company appointed the building committee, as its records showed. The building committee was—Mr. Ballard was one of them, they were authorized to call upon and employ an architect to construct the building. We do not have the contract that was made with the architect; [37] I don't know in whose name the contract was made, whether it was made in the name of Occident or Seattle.

The facts all the way through this case will show that while there was a corporate form here, and a legal incorporation we will assume, it had no other purpose except the holding of title to realty, temporarily, for and on behalf of Seattle; and we think that under the law, which we will amplify in our brief, which is authorities which I think pretty well

recognize the proposition. There are certainly a strong line of cases from the Second Circuit on that point, even running down here to one recently within the last two weeks—two or three weeks—that where a company has no other title or function, except a mere holding of the title of real estate, and is under the control and domination of some other company, the corporate entity is—may be disregarded for tax purposes and the—and the income from the property, and of course that isn't involved here, but the corporate entity may be disregarded generally, not only for tax purposes but for other purposes as well.

Now it's true that in this case [38] this—these transactions took place back in 1901 to 1906 when we didn't have any income tax law, and of course there was no motive of tax avoidance entering into the picture because there wasn't any tax; but there are still a line of authorities that in tax matters who prefer substance over form. You look at the transaction not—or the legal title is not determinative in these matters, but you can survey the entire picture and determine whether it is the truth in reality.

Occident paid out its money for this property.

Now, it's, of course in this case, the parties, or a good many of the parties are dead. It happened a long time ago. I think, outside of Mr. Ballard, there isn't very many of them that were of the original parties that were—entered into this deal that are still here. There may be one or two—

The Court: There is no issue involved here as to the cost of the construction of the building on the lots, is there?

Mr. Miller: No. I was going to come to that. [39]

The Court: All right.

Mr. Miller: The building was constructed, and there is no question about the amount of the cost of it. We have stipulated on the amount of the cost. The building was finished along in the early part of 1906. They moved in on—in April, 1906. The building was deeded over in February, 1906, just about the time that it was made ready for occupation.

This building was—the cost of it has been stipulated about two hundred and some—two hundred and seventy—no, the cost of it would be two hundred and forty-four thousand dollars, under the Government's contention; that was the actual adjusted cost for the building. However, if—if the taxpayer is correct here in his position, and if that its cost was the value of the building in February, 1906, then we stipulated that the fair market value of the building in Febru—on February 21, 1906, was some two hundred and seventy thousand dollars. However, the stipulation expressly provides that the defendant does not admit that that sum of two hundred and seventy thousand dollars was the fair market value of the building on any other date except [40] February 21, 1906. I told counsel that we—our intention in putting that reservation in was not to be technical, but if the liquidation took

place on February 20th, 1906, or some date within a day or two, of course our—we would admit that the value was the same on those two days; but if the crucial date is some date removed, within a distance of even as much as a month or more, we would not admit that that was the fair market value of the property, because the property values, according to the testimony and the evidence here, the differences in value over a period of years were fluctuating greatly during this period of time.

Now, there is a number of technical questions in this case that have to be considered. Of course it's true that in determining losses, Congress has provided that the basis is the cost of the property, even though it was acquired prior to March 1st, 1913. That isn't true as to gains, but determining losses it's—it's a cost regard—even if it is purchased back in 1890 or some earlier date.

Now, it's true also that under Section 115(c) of the Internal Revenue Code, that [41] generally where a liquidation takes place and there is a distribution of the property by a corporation to its stockholders in exchange for stock, that's treated as a sale of stock, and gain and loss is recognizable on that transaction.

There are some exceptions in the act which we want to discuss. There's a Section 113(a)15 of the Revenue Code, providing that if the property is received by a corporation upon a distribution in complete liquidation of another, within the meaning of Section 112(b)6, then the basis shall be the

same as it would be in the hands of the transferor. Of course, that puts us back into Section 112(b)6 to see what that means.

112(b)6 was enacted in 1934, but the authorities hold that these bases statutes, in determining bases you go to the Revenue Act in the year involved, not in the year of the bases. In other words, if you've got a transaction, a sale that took place in 1928, which defines bases, you go to the 1928 act to determine the proper basis to be applied.

Now the only difficulty with this proposition is that here you are going back, back [42] beyond the March 1st, 1913. The act is not entirely clear, and I want to discuss it and study it further and treat it in my brief; but we think it's reasonably plain that 112(b)6, which provides that no gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation, refers to the basis of that property, of course, and it goes back—it goes back just as far as necessary in order to determine the question.

Then there's a similar statute as Section 113(a)11, and it provides that where a property is acquired by a corporation during a period of affiliation, the basis shall be determined without regard to inter-company transactions in respect to which gain or loss was not recognized. Now the only question there is the meaning of that word "affiliation." Does that word have some definite meaning connected with tax matters, or is the word "affiliation"

a word that could be applied to two corporations where one of them owned all the stock of the other, even back before the days of the enactment of the Sixteenth Amendment? That's the question involved there. Now any one of those propositions, the application of either of the statutes would defeat the plaintiff on its theory of the case.

Then there's a further question in this case as to whether or not the Occident liquidated in 1906. If it delivered a deed to Seattle, and the trustees of Seattle passed a resolution stating that that deed would be held for the present, and not recorded, a situation was presented whereby that deed could have been turned back without any difficulty; and if the stock was not canceled under the liquidation, there are authorities holding that that is not a liquidation within the meaning of Section 115(c).

As a matter of fact, this corporation stayed in existence until 1909, when it was—it's existence was terminated because it didn't pay its corporate fees to the State of Washington. It could have been revived, it is assumed, at any time before that and continued to be operated as a corporation.

Now if that's true, that the liquidation didn't occur until 1909, then we have—then we have the question of value, and I think the plaintiff would not be entitled to [44] recover for failure of proof, because I don't think they are going to be in any position to show that—we understand the market dropped again between 1906 and 1909, we don't think

they are going to be in any position to show that the values that have been assigned here, or that they can show, that is, the cost that has been attributed by the Commissioner is out of line in this case.

The—there are many questions entering into this case from the standpoint of the—a good disregard, or of the corporate entity.

I might say, also, we have—there's a somewhat serious question here in our mind whether they—under the circumstances, as outlined in this case, and as the evidence will show, whether they did acquire this property under such circumstances as they could—as to make it includable in the invested capital at any figure higher than the basis of the transferor; but I want to go into that further, also, in my brief.

Now the general principles under which this corporate entity here should be disregarded is, first, the old legal principle that substance rather than form governs in tax matters, and that the legal title alone is not the [45] determining factor, but taxation is more concerned with the actual benefit for which the tax is paid than it is with the refinements of legal title.

Then there is a further question that if—if you—if a transaction is carried out by several steps, that is, you deeded property to a certain person and then that property is later deeded to somebody else, and then deeded to somebody else—it all is a part of one plan, you cannot break up those steps—

or, you cannot separate those—that transaction into separate parts for tax matters, but that is all treated as one transaction.

Then there's a—then there's a general rule that is applied not only in tax matters, but in all matters dealing with corporations, of where ownership of stock is resorted to not for the purpose of participating in the affairs of the corporation in a manner normal and usual to the stockholders, but merely to make it an agent or instrumentality or a department of another company. The courts will look through the forms to the realities of the situation between the companies, and will deal with them [46] as the justice of the case may require. The Supreme Court has spoken on that on—on several cases. And these rules are not applicable merely to matters involving taxes, but they're applicable generally and they're—we—we are going to cite to you very many cases where the corporate form has been disregarded and in cases like this, which we think is an extreme case, under the evidence, where they will look beyond the corporate entity and merely treat the—the subsidiary as the—as the agent or instrumentality of the corporation.

We've got some cases here almost like this, we think, in their facts, where that—where that had been done.

And of course this case will depend upon the evidence, like all cases, and the evidence, we believe, though, will generally support the propositions that I have just outlined.

There is one other thing I wanted to mention to you, that I don't know that we've stipulated on it. There has—there has been a jeopardy assessment imposed by the Commissioner for the years '43 and '45, an additional assessment and an over-assessment of—well, it results in a net overassessment. [47]

Now we have stipulated that that—that any questions relating to those over-assessments will not be litigated in this proceeding, but that this proceeding will not constitute res judicata as to any questions that might come up with reference to those—to those matters at a later date, and that each side has expressly waived any right to rely on the decision in this case as being res judicata in those matters.

The Court: Your stipulation will be respected in that regard.

Mr. Jones: I think it might help a little bit if I'd refer to just two or three things here very briefly.

The matter that Mr. Miller referred to, of the fact that the conveyance from Occident Trust Company to the Seattle Hardware Company was not recorded for some time after it was given. In my opinion it is absolutely immaterial. The recording of a deed, of course, is no part of the conveyance. It has nothing to do with the validity of the conveyance, except as affects third parties who might otherwise be prejudiced for some reason; but as between the [48] parties, the recording in itself, means noth-

ing, and the transaction is just as complete a transaction upon the delivery of the deed, whether it's recorded or not. Now—

The Court: Well, isn't that dependent upon whether the delivery is an irrevocable delivery, or whether it's a delivery of condition?

Mr. Jones: Well, if it's a conditional delivery, yes, I think so; but if the—if the deed on its face and the conveyance on its face is an absolute conveyance, then certainly it makes no difference whether it's recorded or not.

Suppose, for instance, that I came in as a purchaser of stock in the Seattle Hardware Company in 1907, say, after it had acquired this property but before it had gotten—put the deed on record. It would make no difference whether the deed was on record or not; I would be entitled, as a—as a stockholder of that company, to insist, that is, against Occident Trust Company, that I owned the property, regardless of the record.

Now, the points that counsel has made about the statutes, evidence some of the complications that I suggested, but while this is [49] fresh in Your Honor's mind, I would like to just call attention to our position on those particular points. Take, for instance, this reference in 113(b)15 to 112(b)6. Now 113—I guess that was (a)15, 113(a)15, property received by a corporation on complete liquidation of another. And it says that if it was so received within the meaning of Section 112(b)6, then the basis shall be the same as it would be in the

hands of the transferor. So you have to go back to 112(b)6, as Mr. Miller says; but when you get back there you find that 112(b)6 says that for the purpose of this subpara—of this paragraph, a distribution shall be considered to be in complete liquidation only if (b) no distribution under the liquidation was made before the first day of the first taxable year of the corporation beginning after December 31st, 1935.

In other words, 112(b)6 has no application to a distribution made prior to the first of 1936.

Mr. Miller: There is another—there is another condition in that, I think, that will apply.

Mr. Jones: Not—not that I find. [50] I mean, it—it is very definite that—that a distribution in liquidation, within the meaning of 112(b)6, shall not be considered such unless—if there was a distribution made prior to 1936.

That just illustrates the exceptions and the answers to the exceptions that I said—referred to in my opening statement.

Then again, counsel refers to 113(a)11, which is transfers—bases on transfers between affiliated corporations. Well, now, in the first place that refers—it says that the basis shall be determined without regard to intercompany transactions in respect of which gain or loss was not recognized. Well now, that non-recognition of gain or loss comes into the tax law only through 112(b)6 and similar provisions, which were adopted for the first time, as I recall it, in 1918; so you have no non-recognizing provi-

sions of the statute back of that time; but in addition to that several courts have passed on this very contention that the Government makes, that a liquidation would be a transaction between affiliated corporations, a liquidation of a wholly owned subsidiary, and they have said "no," that this refers to transactions during the course of [51] affiliation, that liquidation breaks the affiliation and that this section does not apply in cases of liquidation.

Now those, of course, will be matters to argue in the brief, but I simply refer to them to show how nice the distinctions are, and how delicate the—the points are, and how careful we must be to follow the language of the statute.

Counsel said that the evidence would show that the Occident Trust Company is not held out as a corporation to the public. I—I think that that is not a maintainable statement because in the first place its articles were filed as a matter of public record; a conveyance to it was filed as a matter of public record, of this property; and as we shall show in the course of the trial, a great many contracts were entered into directly with the Occident Trust Company and bonds given to secure performance in the erection of this building, in the name of the Occident Trust Company.

Now just one other thing. Mr. Miller suggests that if Seattle Hardware Company itself had acquired these lots in 1901, then the Government would have to be sustained in this case. I—I entirely dis-

agree with that. [52] I think it would have been perfectly consistent and perfectly in accord with plaintiff's theory, if Seattle Hardware Company had either directly itself formed Occident Trust Company, or, it being formed, if it purchased all of the stock and furnished the money with which Occident Trust Company bought this property; or if it—if Seattle Hardware Company itself bought the property and then turned the property into the Occident Trust Company for the stock of the Occident Trust Company, which is what counsels thinks occurred here and I—I can't—I can't say it didn't occur. I—I can't vouch for the fact that it did; but assuming that it did, assuming that Seattle Hardware Company in substance, put up the money to buy the property, and then formed the Occident Trust Company for reasons connected with the good management of its own business, to keep it out of the Seattle Hardware Company, put it into a separate company to build the building, incur the credit risks and the financial or physical risks of construction during the period of construction; if it did that and then at the end of that period took the property back by a liquidation of the company, that in my mind is [53] entirely within the scope of the law and the cases supporting the right to the—take the basis as of the date of the distribution or liquidation or reconveyance.

Now the Commissioner himself has maintained that position time after time, where corporations have formed subsidiary companies for limited pur-

poses, sometimes much more limited than this, and then when they have—have accomplished the purpose and seek to change the situation, take the—and dissolve the subsidiary, and there's been a gain, they have been taxed on the theory that that is a consummated transaction resulting in recognition of gain or loss; but that is, as counsel says, is a matter that we will have to submit on the cases.

The Court: Well, it seems to the Court, on the basis of the opening statements that have been made, that we might be able to better try this case by piece-meal, which is an unusual procedure, but this is what I have in mind: the first issue to be determined in this case is whether, in fact, the Seattle Hardware Company acquired the property, either directly or indirectly, for their own use and benefit, and if [54] they acquired it in that manner, by using in one instance, Mr. Bronson as the grantee in the deed of conveyance but they actually paid the money, and that he was merely acting in the capacity of a trustee for the corporation, Seattle Hardware Company, and then this Occidental Trust Company was created again through the action of the Seattle Hardware Company for the purpose of taking title to the property and constructing thereon a building, and when that was done it was turned back, that appears to be the contention made by Mr. Miller's statement, and that I assume is disputed by the plaintiff herein.

But that issue should be determined, and if it's determined, and if it's determined adverse to the defendant in this case, then all of these other matters

will become material; if it's determined adverse to the plaintiff's contention, then it would virtually be determinative of the case, would it not?

Mr. Miller: I would like to suggest to Your Honor along that line, all the evidence can be put in at this hearing; but does the putting in of the evidence on the issue that you have just outlined, will cover the other issues also, I think. Now it is just a question of [55] whether Your Honor would care to have only that first issue covered by briefs and arguments and disposed of first. There would be no necessity, as I see it, to introduce any further evidence in the case, because the evidence covering that issue, together—

The Court: Well, if that's the situation, why, of course, I'd be a party to that; but I—I—as I see the matter now, that's an issue that I'm going to have to make a determination of—in. I don't want to—if it were determined adverse to the contentions now made by the plaintiff here, to burden counsel on both sides, and the Court likewise, on these highly technical issues of law that are raised on—by the citations of the Revenue Act.

Mr. Miller: I would like to make a suggestion. I don't like to—it is going to mean a lot of work to brief these technical questions. If you could dispose of that issue first—

Mr. Jones: Of course you can't—

The Court: Well, of course, you can't call upon the facts.

Mr. Jones: There—there are some of the tech-

nical aspects of it that are going [56] to find their way into the determination of that question, but I think that counsel's first suggestion that the evidence is very short—we will finish the evidence. I have one witness who should probably take fifteen or twenty minutes. I don't know if I'll have anything more except the documents as evidence, and I think we should go ahead and make our record, and then the submission of it. Of course for submission, we can take whatever course may seem proper, but naturally, whichever way the case goes, the record, I think, should be made of it.

The Court: Well, I'll permit you to do that, assuming from what you state to me, it's not going to lengthen the hearing.

Mr. Jones: Oh, no, it won't materially lengthen the case.

The Court: But then—and I shall keep an open mind on the primary issue here, and your brief should be addressed to that first, and I can make a determination of that issue, and on the outcome of such determination will arise the question of whether I want second briefs on the [57] other technical issues.

We'll take an intermission now of ten minutes.

(Recess.)

## CHARLES S. WILLS

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Jones:

Q. Will you state your name?

A. Charles S. Wills.

Q. Where do you live, Mr. Wills?

A. Seattle.

Q. What is your business?

A. I'm the Executive Vice President of the Ernst Hardware Company.

Q. Are you a stockholder of Seattle Hardware Company? A. I am not.

Q. Or connected with the company in any way at the present time? [58]

A. None whatever.

Q. Do you have any interest whatsoever in the outcome of this litigation?

A. None whatever.

Q. Now were you ever connected with the Seattle Hardware Company? A. I was.

Q. During what period of time?

A. From April 29, 1904—rather, May the 1st, 1904, until July of 1930.

Q. And in what capacity?

A. As treasurer.

Q. Were you a trustee of the company also?

A. I was.

(Testimony of Charles S. Wills.)

Q. How did you happen to become connected with the Seattle Hardware Company?

A. Well, I was in the office of the President of the company, back in Detroit, Mr. Clarence Black, and I had just—I had given up the practice of law and came west to be the treasurer of the Seattle Hardware Company.

Q. And when you came, who were the chief executives of the Seattle Hardware Company?

A. Mr. A. S. Burwell, Mr. C. H. Black—Mr. C. A. Black, and Mr. Ballard. [59]

Q. What Mr. Ballard is that?

A. That's the father, M. D.

Q. M. D. Ballard, the father of R. C. Ballard—

A. That's correct.

Q. ——who is now the secretary—

A. Now the secretary.

Q. ——of the company?

A. That's correct.

Q. Those men you have mentioned, are they still living, any of them?

A. They have all passed away, excepting Mr. Ballard, that's Mr. R. C. Ballard.

Q. How closely were you associated with those executives after you became connected with the company?

A. Well, I was made a trustee of the company from 1905, assistant treasurer, and then treasurer, and remained in that capacity until I left the company.

(Testimony of Charles S. Wills.)

Q. Do you recall the Occident Trust Company, a corporation?

A. Yes, I recall we had a corporation by that name, Occident Trust Company.

Q. Do you recall whether there were any stock certificates issued by that company? [60]

A. I am quite sure there were.

Q. You have a—a recollection—

A. That's right.

Q. —of seeing stock certificates.

A. Yes, I—

Q. Do you recall in whose name the stock certificates were, do you have any recollection on that?

A. Well, my recollection was that there were three qualifying trustees, and then one stockholder held the balance of the stock in the name of a trustee, in his name as trustee.

Q. And do you know who was regarded as the beneficial owner of that stock, from 1904 on?

Mr. Miller: By whom?

Q. Well, by your—by the Seattle Hardware Company, or the executives of that company.

A. Well, it would be by the executives and the Seattle Hardware Company. The Seattle Hardware Company, I should say.

Q. Was considered as the owner?

A. Yes, the beneficial owner.

Q. Do you know whether there was a stock ledger kept of Occident Trust Company stock?

A. I'm not certain as to that. We were very

(Testimony of Charles S. Wills.)

common-minded, and I think they probably kept that under [61] one name, and then there—under one account in the ledger, but I'm not certain on that score. I know we had a common bookkeeper for both the Occident Trust and the Seattle Hardware Company.

Q. Well, what I was talking about, Mr. Wills, I think is a little different than what you have in mind. I was talking about whether there was any ledger kept showing the ownership of the stock of the Occident Trust Company, if you recalled any such ledger, or separate stock ledger?

A. Well, I think it was just in the stock book. I'm not certain on it.

Q. Do you recall having seen the stock book, or can you recall having seen it since, say 1906 or 1907?

A. Well, I—I've seen the certificates, but I just can't recall what became of them, or when I last saw them.

Q. There is some reference in some of the books, to Occident Investment Company. Do you know whether there was ever any Occident Investment Company as a separate corporation?

A. I don't think there was. I think that was just an error. It should have been Occident Trust.

Q. Now, what did the assets of the Occident Trust Company consist of, beginning in 1904 and continuing as long as you were familiar with it?

A. The land and building.

(Testimony of Charles S. Wills.)

Q. Anything else?

A. Nothing that I know of.

Q. Do you know when, or what became of the land and building of the—that was held by the Occident Trust Company?

A. That was later transferred or sold to the Seattle Hardware Company.

Q. About when did that occur, do you remember?

A. Well, that was after the building was completed.

Q. Well——

A. And I should say somewhere from six months to a year after that.

Q. Well, to refresh your recollection, if—there appears to be a deed dated February 20th, 1906. Would that correspond about with your recollection?

A. Yes, I think that would be about the time.

Q. I might show you the deed. I——

A. Yes, that's my writing. I prepared the deed.

Q. That—that deed you prepared, did you?

A. I prepared that.

Mr. Jones: Will you mark that [63] as Plaintiff's 1?

Q. And do you know—do you recall now the occasion for the issuance of this deed, or the circumstances under which it was given?

A. Well, they had no further use for the Occident Trust Company. We had no plans for build-

(Testimony of Charles S. Wills.)

ing any more, and we just allowed the corporation to lapse.

Q. What had been the purpose or function of the Occident Trust Company?

A. To build this building on the land that they had acquired, and to make the contracts in the name of the Occident Trust Company, and do all those things that would avoid the responsibility or legal liability of the parent company.

Q. And what were the reasons why they—well, I guess you have stated the reasons why it was a separate company.

A. Well, there was one other reason. They had to borrow money and they didn't—

Mr. Miller: May I—

Mr. Jones: Yes, surely.

Mr. Miller: This witness was not there when the Occident Trust Company was formed, and I wonder if you would show what basis—

Mr. Jones: Well, of course, he [64] can only speak from the time that he became connected with it, or from such conversations as he may have had with his fellow executives.

Mr. Miller: It would have to be based on hearsay, because he was not there at the time that the company was formed. I think I will object to the question, unless you lay the basis for the testimony.

Mr. Jones: Well, I'm—I'm asking what the witness knows, and I submit that in any—

The Court: He may answer.

(Testimony of Charles S. Wills.)

The Witness: Is it all right?

Mr. Jones: Yes, you may answer.

A. One other reason was, they had—had to borrow money, and that was an obligation of the Occident Trust Company, and it relieved the Seattle Hardware Company from that much bills payable.

Q. Were you with the company at the time that that mortgage was given, do you recall?

A. Well, that I can't recall, but I do recall many times going to the Thomas Investment Company to make an installment of interest.

Q. This will be shown in evidence a little later, that under date of September 21st, 1905, the Occident [65] Trust Company issued a mortgage to Travelers' Insurance Company for a hundred and fifty thousand dollars. Were you with the Seattle—

A. I was.

Q. —Hardware Company at that time?

A. I was.

Q. Is this one of the circumstances that you refer to, is it? A. Yes.

Q. Now, when the deed was given by Occident Trust to Seattle Hardware Company, there is a recital in the minutes to the effect that the deed should not be put of record for the time being. Do you recall that, or would you like to see the minutes?

A. Maybe my memory would be refreshed if I—

(Testimony of Charles S. Wills.)

Q. Yes, I'll show you the minutes.

I call your attention to page thirty of a minute book which we will have marked as Plaintiff's 2; I suggest you read that, and then I'll ask you something about it.

Mr. Jones: Now I think the whole book should be marked, don't you, Mr. Miller?

Mr. Miller: Yes.

Mr. Jones: And then we can refer to whatever parts we want to. [66]

The Clerk: Plaintiff's Exhibit 2 marked for identification.

A. I can't recall, but I know the reason for it.

Q. You don't know what the reason for it was?

A. I know my own reason at this time, in reading it over, and I think that was the reason at the time.

Q. Well, would you state—

A. The—there were some unsettled matters of the Occident Trust Company, involving the—in connection with the material that went into the building, and they thought it was apparently advisable to hold that up until that was all settled.

Q. That is, to hold up the recording of the deed.

A. Recording of the deed.

Q. Well, who—who took the deed at the time that it was executed? Whose possession then was it put into?

A. Well, I think C. H. Black. Now, I have—

Q. And he was what officer of the Seattle Hardware Company?

(Testimony of Charles S. Wills.)

A. He was one of the—I don't think he had a title, but he was the directing-managing director.

The Court: The managing director of which corporation? [67]

The Witness: Of the Seattle Hardware Company.

The Court: And he was secretary of the Occidental—

The Witness: He was secretary of the Occident Trust.

Q. Was there any suggestion or anything to the effect that the, as between the parties, the delivery of the deed should be delayed, the delivery of the deed itself, as between the parties, should be delayed?

A. No, I think not.

Q. Now, from the time of the delivery of that deed, did the Occident Trust Company carry on any business or engage in any business transactions?

A. Not to my knowledge.

Q. Well, would you have known if it had?

A. Well, I'm reasonably certain; I think the account was ruled off.

Q. And do you know whether it continued to pay any license fees to the state, after that time?

A. I don't know whether they paid that year or not, but I know that it wasn't paid for some years and then the Secretary of State just scratched it from the records. It was allowed to lapse. [68]

(Testimony of Charles S. Wills.)

Mr. Jones: That's all.

### Cross-Examination

By Mr. Miller:

Q. Mr. Wills, you came into the company in May 1904.

A. Yes, I arrived in Seattle on April 29, 1904, and I think it was around the first of May.

Q. At that time had the building—had the building construction been started?

A. Yes, it had, they were driving the piles.

Q. Had the old buildings been torn down?

A. Oh, they must—yes, they must have.

Q. They were torn down.

A. Although, I didn't—I didn't—I never saw the old buildings.

Q. You don't know anything about how the old buildings were rented, that is, of your own knowledge, who collected the rents, do you?

A. No, I do not.

Q. You don't know who employed the architect to construct the new building, do you?

A. Well, the—I—

Q. Making the plans for the new building, we will take that up first. [69]

A. No, because that was ahead of my time.

Q. That was before your time.

A. But I know who the architect was.

Q. Now, I believe you testified that you saw some—some stock certificates that had been issued. Are you positive about that, or is that just—

(Testimony of Charles S. Wills.)

A. Well, I'm reasonably certain. I just—it's just from memory, it's been forty-four years.

Q. Of course, you—there were stock certificates issued by the Seattle Hardware Company for its stock, it had a stock book. Do you know how many certificates were issued by the—by the Occident Company?

A. Off-hand, I think there were four.

Q. And who were they issued to?

A. Well, this is from memory. I think there was one share in each of the three—three trustees, and one share for the—one certificate for the balance of the shares to a trustee.

Q. And who was that trustee?

A. Well, that—there was Mr. M. D. Ballard, Mr. F. W. Baker, Mr. C. H. Black, and Mr. A. S. Burwell, and which one was which, I don't know, but they were all—

Q. Were there any of these certificates issued to Mr. Bronson? Did you see any certificates issued to him?

A. Well, I think the original company was Mr. Bronson, and I think he subscribed to the original stock.

Q. Well, were the stock certificates issued in his name?

A. That I—I don't remember ever seeing those.

Q. As a matter of fact, the entire matter is rather hazy in your mind, isn't it? You're not

(Testimony of Charles S. Wills.)

certain as to just what—what those certificates showed.

A. Well, it's a matter of reasonable memory. I've happened to have seen the certificates.

Q. Now, after the deed was delivered, in February 1906, do you know what was done with those certificates?

A. No, I don't, no.

Q. Do you know whether they continued to remain in the stock book after that, or in the files of the Occident Trust Company?

A. The stock book—the stock book and the minute book were left in the hands of the secretary, Mister—I think it was Mr. C. H. Black.

Q. Well now, you know, don't you, Mr. Wills, that the minute book is—has been located and has been found, that there's been—

A. No, I didn't. I didn't know anything about it. [71] I didn't know whether it's been lost or found.

Q. And that there is no record of any—of any stock certificates, or any stock book.

A. I didn't know that.

Q. You testified, I believe, about the mortgage that was executed in October of 1905. That was a mortgage for about a hundred and fifty thousand dollars, wasn't it?

A. That's right.

Q. And that was a mortgage to raise funds for the construction of the new building, wasn't it?

(Testimony of Charles S. Wills.)

A. That's right.

Q. Who signed that mortgage? And note.

A. Well, the officers of the Occident Trust Company, and I think it was guaranteed by the Seattle Hardware Company.

Q. As a matter of fact, the Seattle Hardware Company signed both the note and mortgage along with Occident, didn't they?

A. Yes, in the nature of a guarantee. That was the nature of it.

Q. Well now, you testified that the purpose of forming Occident, if I understood you right, was that, so that Occident would not avoid—or, would avoid becoming obligated for the construction of this building.

A. You mean the Seattle Hardware Company.

Q. The Seattle Hardware, I mean, yes. Well they did sign this note and mortgage, which was placed on record along with Occident, didn't they?

A. Yes, but that was in the nature of a contingent liability rather than a direct.

Q. I see. Did—were there any other books kept except the minute book and the stock book, of Occident?

A. I couldn't say.

Q. You don't remember any others, do you?

A. No, I couldn't say.

Q. And as a matter of fact, the account showing expenditures that was made in the construction of this building was—were all carried on Seattle Hardware Company's books, weren't they?

(Testimony of Charles S. Wills.)

A. I think they were in a private ledger.

Q. And they had an account—an account that was originally made out to the Occident Investment Company, wasn't it?

A. Yes, I saw that.

Q. Carried in that name.

A. Well,—

Q. And there was no such a—such concern as the [73] Occident Investment Company, was there? That was—

A. I never heard of it. Never heard of it.

Q. And then the name was changed over later, to the Occident Trust Company.

A. That's right.

Q. Do you know when that was changed from the Occident Investment Company over to the Investment—Occident Trust Company? About when—was that after you came there?

A. Well, I—I don't recall it ever being the Occident Investment Company.

Q. I see. You haven't examined that account recently?

A. I saw it the other day, and Mr. Jones called my attention to it. It was all news to me.

Q. Well, as a matter of fact, the procedure was that whenever any payments were made on account of the construction of the building, they were paid out of the Seattle Hardware Company's funds, were they not?

A. The Seattle Hardware advanced funds for—

(Testimony of Charles S. Wills.)

Q. They advanced all the funds for the—and then they made a charge on this account to—or a credit on this account, to Occident, didn't they?

A. It was handled through—that was a credit.

Q. And that was all handled—it was all handled on Seattle Hardware Company's books.

A. I think so.

Q. There was no books of Occident.

A. Right.

Q. And they had no separate bookkeeper, separate and apart from the Seattle Hardware, did they?

A. No, the same bookkeeper.

Q. And they had the same officers, didn't they?

A. What was that?

Q. Did they have the same officers as Seattle?

A. No, they did not.

Q. Who was the treasurer of Occident?

A. Of the Occident Trust Company?

Q. Yes.

A. I think Mr. Baker. He was the treasurer of Seattle Hardware also.

Q. Well, did Occident have any separate bank account?

A. Well, I couldn't say.

Q. You never heard of any, did you?

A. I couldn't say.

Q. Their funds were—connected with this building, were never deposited in any separate trust, to your knowledge, or any separate account.

(Testimony of Charles S. Wills.)

A. Well, the ledger would show it, but I don't recall it. [75]

Q. Now, about this deed, you testified—did you read the entry in the minutes of the trustees concerning this deed?

A. Yes, I just read it.

Q. "It was further moved and carried that the real estate be transferred from Occident Trust Company to this company, but deed not placed of record for the present."

Was that matter discussed there at the meeting of the trustees at that time?

A. Well, I'm sure it was.

Q. Do you remember the discussion?

A. Well, I can't quite remember that, but I know about what the reason was.

Q. The reason was that you wanted to use the Occident Trust Company in the future, in the event there was any claims that might be asserted against the contractors in connection with the building, is that correct?

A. There was some—some unsettled matters, claims—some disputes.

Q. And was it definitely understood that the deed would not be put of record until those matters were settled?

A. Well, apparently from that resolution, that was [76] the reasoning.

Q. Then the deed was not to be considered to be delivered, was it, until those matters were settled?

(Testimony of Charles S. Wills.)

A. No, the transaction was closed. It was turned over, and—

Q. Well,—

A. —as far as the books were concerned, it was a—a washout.

Q. Suppose some matters come up in the future, and it was necessary for Occident to assert a claim against the contractor, then how—what was your understanding about how that matter would be treated?

A. Well, that would be subject to adjustment and there would be—there would have to be a settlement of some kind.

Q. Was it contemplated that circumstances might arise under which the deed might be returned to Occident?

A. No. No.

Q. That is, the—

A. No, the—the whole thing was to close the affairs of the Occident Trust Company, and there would—it wouldn't have been withheld from record if there hadn't been some pending matters.

Q. Well, it was, though, to be withheld until those matters were cleaned up. [77]

A. Yes. The deed, however, was transferred to—

Q. Well, there wasn't really any physical delivery of the deed. It was—the deed was kept—

A. I prepared the deed and I gave it to the—

Q. Who did you give it to?

(Testimony of Charles S. Wills.)

A. ——Seattle Hardware Company.

Q. Who did you give it to in the Seattle Hardware Company?

A. I couldn't tell you at this minute, but it was—went out of my possession.

Q. Well, you were—wasn't you an officer of both companies? A. No.

Q. You were just an officer of the one company.

A. That's right.

Q. And who—you just turned it over to one of the other members of the—

A. It might have been turned over to the attorney for filing. I'm not certain.

Q. Now, I believe you testified concerning the reasons for the formation of the company. Now that was, I suppose, was gained by talking to some of the other parties that had formed Occident.

A. This had all been done prior to my coming.

Q. Who did you talk to about that? [78]

A. Well, I don't know that I talked to anybody, but I heard the conversations in the meeting.

Q. Well, who did you hear talk about it?

A. Whoever were present at the meeting, and it might have been Mr. C. A. Black, Mr. C. H. Black, Mr. F. D. Black, Mr. M. D. Ballard, Mr. A. S. Burwell, Mr. R. P. Ballard.

Q. What in your—what, according to what they said, was the reason for Occident?

A. I beg your pardon?

Q. What—what did they say was the reason for the formation of Occident?

(Testimony of Charles S. Wills.)

A. Well, the Seattle Hardware Company was a trading concern, engaged in merchandising, and this was another venture, building a building, and it involved considerable liabilities and responsibilities and they thought the best way to—to overcome that was to have a separate corporation to do the work, to complete it, and to borrow money for its completion.

Q. Borrow it in the name of this separate corporation.

A. Occident—yes, Occident Trust Company.

Q. It was understood, wasn't it, that as soon as the building was completed, then the property would be transferred back? [79]

A. That, I don't know.

Q. You didn't hear anything said along that line one way or the other. A. No.

Q. When was the building completed?

A. Well,—

Q. Approximately.

A. —it must have been sometime in 1905, just when I couldn't tell you.

Q. And when did Seattle move into the property—into the building?

A. Oh, somewhere from a year to a year and a half after I came. I don't remember just exactly.

Q. That would put it sometime in the early part of 1906, wouldn't it?

A. The latter part of 1905 or early part of 1906.

Q. And then as soon as they moved into the

(Testimony of Charles S. Wills.)

building, why, the property was deeded to Seattle Hardware Company, wasn't it?

A. Well, I don't know how soon, but—

Q. Wasn't it approximately the same time?

A. Well, that I couldn't say, but within a reasonable time after they got the building completed.

Q. Now the company—did the Occident Company own no other property except this property?

A. Not to my knowledge.

Q. And it had no other duties to perform except the holding of title of this property.

A. And building the building.

Q. And the construction of the building. Well, the construction of the building was all supervised by a Building Committee appointed by the Seattle Hardware Company, wasn't it?

A. Well, they were all interlocked there.

Q. They were all interlocked. Well, don't you know that the minutes of the Seattle Hardware Company provided for the appointment of a Building Committee to superintend the construction of the building?

A. I think that would be the natural plans, yes.

Q. So, they were looking after the construction of the building; they were advancing all the money for the construction of the building.

A. Well, I don't think all of the money.

Q. Well, where did the rest of the money come from?

(Testimony of Charles S. Wills.)

A. Well, I think there was some contribution there from the stockholders, just how much I don't know—

Q. Well, at any rate—

A. —outside of the land itself.

Q. There wasn't any money put up by Occident because [81] they didn't have any bank account, did they? A. Well, I—

Mr. Jones: If Your Honor please, I think this is purely argumentative. Even the evidence shows that they had a hundred and fifty thousand dollar loan from a mortgage company.

The Witness: Travelers.

Mr. Jones: The Travelers Insurance Company, and I think it's purely argumentative. I didn't go into the financial accounts with the witness, but I—

The Court: He may answer. The objection will be overruled.

Mr. Miller: Read the question.

The Reporter: Question, there wasn't any money put up by Occident because they didn't have any bank account, did they?

A. I don't remember now, exactly, but I think that some of the stockholders borrowed money and put that—put it into the Occident Trust Company.

Q. Stockholders of who?

A. Of the Seattle Hardware and of Occident Trust.

Q. Well now, who are the stockholders of the Occident Trust?

(Testimony of Charles S. Wills.)

A. Well, there'd be M. D. Ballard, and there's C. H. Black, and F. W. Baker, and A. S. Burwell.

Q. Well, I thought that you—I thought that the Seattle Hardware Company was the real owner of the stock of the Occident Trust Company.

A. Well, Seattle Hardware was the real owner of the stock, but I—I think there was some money put up by—I can't tell you definitely because—

Q. Yes.

A. —I am only speaking from recollection.

Q. But the people that put it up, put it up because they were stockholders of the Seattle Hardware Company?

A. Oh, certainly, certainly.

Q. Not because of the nominal ownership of stock in the Occident Trust Company?

A. I don't know what the reason was for it, other than they wanted the building.

Q. Now do you know where the money came from originally that was used to buy these two lots? Was that ever discussed in the meetings?

A. No, that—I think that was done some—a number of—a few years before.

Q. You never heard that matter discussed, did you? A. No.

Q. Did you know Mr. Bronson—Ira Bronson?

A. Very well. Very well.

Q. He was attorney for the Seattle Hardware Company. A. That's correct.

Q. You knew that he had held deeds—a deed

(Testimony of Charles S. Wills.)

to this property for about two years, before it was turned over to Occident Trust, didn't you?

A. I don't know that I knew that until I heard it discussed here the other day. I wouldn't say

Q. And you don't know how the stock got from Mr. Bronson's name over into the name of the Seattle Hardware Company, or if it ever did. That's the stock in Occident.

A. I don't know the particulars of it, I know in my own mind, I think, but I don't know the particulars of it.

Q. Well, in your own mind, and from what you've seen and observed, what—what would you say?

A. Well, I think Mr. Bronson and two others organized the company, and subscribed for the stock; then they resigned and the other—then the Seattle Hardware officials came in and took their places and carried on the corporation.

Q. Bronson did that just as a nominee of the Seattle Hardware.

A. I presume so. I'm—I'm testifying that I—that's [84] the way I think it would be done. I don't know.

Q. You saw no indication any way along the line that Bronson was the real owner of this stock, at any time.

A. Well, he acted in a representative capacity, probably.

Q. And he was Seattle Hardware's regular attorney. A. That's correct.

(Testimony of Charles S. Wills.)

Q. Now what were your duties in connection with the—there in 1904, '5 and '6, when you worked for the Seattle Hardware Company?

A. When I first went there I was credit manager and assistant treasurer, and trustee. Later, Mr. Baker resigned and I was made treasurer, and continued as trustee.

Q. During what period of time were you treasurer?

A. Well, I think I was made treasurer somewhere around 1908, and up to the time I sold my stock in the company on July 1st, of 1930.

Q. You were not treasurer, of course, during any of the time between 1901 and 1906?

A. No.

Q. You had nothing to do with the payment of any taxes on this property, prior to 1906, prior to the year 1906; and you don't know who paid the tax—who advanced the tax—the money that was used to [85] pay the taxes on this property?

A. I couldn't say.

Q. Well then, the only activities that you know of that the Occident Company performed, it held the title to this property and during the time that the building was constructed.

A. They not only owned—held the title, they owned the property and they built the building and borrowed the money to complete the building.

Q. You say they built the building, but of course the—all the actual supervision was done by offi-

(Testimony of Charles S. Wills.)

cers and employees of the Seattle Hardware Company wasn't it?

A. Well, they are both—a number of them are officers of both companies.

Q. I see. Well, did this Occident Trust Company ever—ever have any separate letterheads on which its letters were written out to the general public, or anything of that kind? That you know of?

A. Not that I recall.

Q. Was it ever listed as a separate corporation in the telephone directory?

A. Well, I couldn't say. The directory would prove that. I—I don't remember.

Q. You don't remember it. Did it ever declare and [86] pay any dividends?

A. That I couldn't say.

Q. Do you know how many meetings of the trustees were ever held during the time of its existence?

A. I couldn't say. I was not an officer.

Q. During the time that you were there, how many times did you attend trustees meetings of Occident?

A. I was not a trustee of the Occident Trust, and I was not—

Q. Well you was—you was an officer of Occident Trust, wasn't you? A. I was not.

Q. Well you had no connection, then, with Occident Trust Company.

A. None whatever. None whatever.

Q. So you don't know anything about their trus-

(Testimony of Charles S. Wills.)

tees meetings, or how often they had them, or anything of that kind. A. No, I didn't know.

Q. Or whether they ever did meet, or whether they—

A. No, the minutes would show that.

Mr. Miller: I think that's all. [87]

### Redirect Examination

By Mr. Jones:

Q. Mr. Wills, did you know Mr. Wickersham, who was the architect on the construction of this building? A. Yes, very well.

Q. Do you know him well enough to recognize his writing? A. Yes. Yes, indeed.

Q. All right. I'll show you a couple of statements, and these will be offered in evidence, on the Pacific Wire and Cleaning Works, which have endorsed the bond for F. D. Wickersham, and what I would like to know is whether you can tell me who wrote in ink on the top of those "Occident Trust Company"?

A. Yes, this is Mr. Wickersham's writing, and I think that that's his writing "Occident Trust."

Mr. Jones: Mr. Miller, I have some more statements which are of a similar character, I mean where they—where they have been endorsed in the same way. I wondered if I could submit those to you and not ask Mr. Wills to go through all of them. They're of the same handwriting. I might—those are going to be included in an exhibit which will be

(Testimony of Charles S. Wills.)

just a folder consisting [88] of a number of statements, and I will have that identified as Plaintiff's 3, and we mark—might mark those 3a and b, if that's agreeable. Will that be all right?

The Court: Yes, if that identification is—

Mr. Jones: I have no other questions, if you would be willing to let that testimony stand as to similar—similar situations.

Mr. Miller: I will allow it. We have that agreement that—

Mr. Jones: Yes.

Mr. Miller: —you will vouch for the—

Mr. Jones: Well, I can't vouch for Mr. Wicker-sham's writing, but I think that it's—

The Court: Mr. Wills, I want to ask you a question or two.

Q. Were you with the Seattle Hardware Company when the mortage was executed to this—

The Witness: Yes. Yes, I was.

The Court: And as—were you treasurer at that time?

The Witness. No, I was assistant treasurer and trustee. [89]

The Court: Do you have any independent recollection, aside from what the records may show, as to who deposited this draft or whatever the document was that evidenced a hundred and fifty thousand dollars?

The Witness: I am sure it was Mr. F. W. Baker, as the treasurer.

(Testimony of Charles S. Wills.)

The Court: Well, was it deposited in the name—or in an account of the Occident Trust Company?

The Witness: That I couldn't say. I couldn't say. I don't know whether—the books would show whether it was—

The Court: Well, you—you didn't keep their books, though?

The Witness: No, we had a bookkeeper by the name of—

The Court: Well, do you have any independent recollection of them writing any checks in payment of construction costs on this building?

The Witness: No, I have no independent—I—

The Court: Do you have any recollection of the Seattle Hardware Company writing checks in payment of the costs of the [90] construction?

The Witness: Well, I'm quite certain that Seattle Hardware Company wrote the checks and charged them to the Occident Trust.

The Court: Who was M. M. Grout?

The Witness: He was the bookkeeper.

The Court: Of the Seattle—

The Witness: Seattle Hardware Company.

The Court: My reason for asking you is, I see he—he acted as—

The Witness: Notary.

The Court: —notary in the making of this deed.

Do you recall who you—at whose request you drafted this deed, Plaintiff's Exhibit 1?

(Testimony of Charles S. Wills.)

The Witness: Well, that was following the meeting of the Board. I presume—well, Mr. Burwell or Mr. Black, whoever was looking after it.

The Court: Well, the deed is signed by Mr. Ballard as president of the Occidental Trust and Mr. C. H. Black as secretary. Well, was it at the request of either one of these men, or do you remember? [91]

The Witness: Well, I think it would be. I wouldn't recall.

The Court: You haven't any recollection.

The Witness: No, that's right.

The Court: They were also trustees of the Seattle Hardware?

The Witness: Yes, that's correct.

The Court: Then after you drafted the deed and after it was acknowledged by Mr. Grout, do you remember to whom it was delivered?

The Witness: Mr. Black, I am quite certain.

The Court: Mr. C. H. Black—

The Witness: C. H. Black, yes.

The Court: —who was acting in a dual capacity as trustee for the one corporation and secretary of the other?

The Witness: That's right.

The Court: That's all, I just wanted to get that straight.

The Witness: May I see that deed a moment?

The Court: Yes.

The Witness: That brings back [92] memories.

(Witness Excused)

Mr. Jones: I offer in evidence as Plaintiff's Exhibit 1, the deed which has been marked and identified—

Mr. Miller: No objection.

Mr. Jones: —and as—

The Court: It may be admitted in evidence.

(Whereupon the deed referred to was admitted in evidence as Plaintiff's Exhibit No. 1.)

Mr. Jones: —Plaintiff's Exhibit 2, the minute book which has been marked and identified.

Mr. Miller: Of Seattle?

Mr. Jones: Of the Seattle Hardware Company, yes.

Mr. Miller: No objections.

Mr. Jones: Now, we can—we can discuss the way we will handle that at the end of the case. And I will offer—I'll withhold 3 for [93] the time being. I'll come to that in a minute; but I'll offer as Plaintiff's 4, an abstract—

Yes, two is marked and offered—

The Court: Yes, two will be admitted. I understand there is no objection.

(Whereupon the minute book of the Seattle Hardware Company was admitted in evidence as Plaintiff's Exhibit No. 2.)

Mr. Jones: As Plaintiff's Exhibit 4, a title trust company's abstract of Lots 1 and 2 in Block 327 of Seattle Tidelands.

Mr. Miller: No objection.

The Court: It will be admitted.

(Whereupon the abstract referred to was admitted in evidence as Plaintiff's Exhibit No. 4.)

Mr. Jones: I'll offer as Plaintiff's 5, the minutes of Occident Trust Company.

Mr. Miller: No objection.

The Court: It will likewise be admitted.

(Whereupon the minutes of the Occident Trust Company were admitted in evidence as Plaintiff's Exhibit No. 5.) [94]

Mr. Jones: I'll offer as Plaintiff's 6, the—a mortgage from Occident Trust Company to the Travelers Insurance Company, dated September 21st, 1905, for a hundred and fifty thousand dollars, a mortgage given by the Occident Trust Company.

Mr. Miller: No objection.

The Court: It will be admitted in evidence.

(Whereupon the mortgage referred to was admitted in evidence as Plaintiff's Exhibit No. 6.)

Mr. Jones: I'll offer as Plaintiff's Exhibit 8,—that last was seven wasn't it?

The Clerk: No, it was six.

Mr. Jones: Six? Oh yes, that's right. Plaintiff's Exhibit 7, a letter from the Secretary of the State of Washington, dated February 21st, 1948, advising that the Occident Trust Company was stricken from the records on August 23rd, 1909 for nonpayment of annual license fees.

Mr. Miller: No objection.

The Court: It will be admitted [95] in evidence.

(Whereupon the letter referred to was admitted in evidence as Plaintiff's Exhibit No. 7.)

Mr. Jones: I—I had intended to direct Your Honor's attention at this time to some of these minutes, but we've mentioned them pretty much in our conversations and I think perhaps we can let that go until the briefs, and we will call attention to them in the briefs.

Now, I want at this time to submit as Plaintiff's Exhibit 3, a quantity of vouchers, contracts, and so forth, miscellaneous items relating to the construction of this building. Their relevancy is the—lies in the fact that they are the contracts of the Occident Trust Company, or in the case of bills and statements, that they are directed to the Occident Trust Company.

I think we have submitted these to you, Mr. Miller.

Mr. Miller: Well, if you will vouch for them.

Mr. Jones: Well, they—I'll vouch for their being part of their—taken from the records of the Seattle Hardware Company. [96]

Mr. Miller: I haven't seen these, but then I assume they are part of—part of the files, whatever they are, but—

Mr. Jones: Yes, they are part of the files. And the—the two 3a and b, that were marked, should be made a part of this exhibit. I don't think we need to go through and undertake to letter them all intrinsically in themselves. No one of them is of any great consequence, but to—for instance, we have

here, given in April, August of 1904, June 23rd of 1905, and April 1904, four surety company bonds, guarantying to the Occident Trust Company, in each case, the performance of certain contracts for construction.

Then we have quite a large number of bills directed to the Occident Trust Company, certified to by the architect as correct for payment; and the general purport of them is to show that the construction was carried on and carried out by the Occident Trust Company.

The Court: Any objection, Mr. Miller?

Mr. Miller: No objection.

The Court: It may be admitted. [97]

(Whereupon the group of documents referred to were admitted in evidence as Plaintiff's Exhibit No. 3.)

Mr. Miller: I want to call the Court's attention to the fact that, in examining these, that some of these at least are made out on letterheads of the Seattle Hardware Company.

Mr. Jones: And I understand that it may be stipulated that in these cases where—some of these bills have—have been directed to the Seattle Hardware Company and a line drawn through them, such as in those two we referred to, and Occident Trust Company's name substituted, and in each case that substitution appears to be in the handwriting of Mr. Wickersham, and I understand that Mr.—the testimony that Mr. Wills gave with respect to the two

specific ones may be considered as running to those particular ones.

Mr. Miller: Well, I don't know that he covered all evidence.

Mr. Jones: No, I didn't ask him about anything—

Mr. Miller: Just in—just in the Wickersham—just in—

Mr. Jones: There may not be any [98] more. I'll just take a look and see if there are any more.

Mr. Miller: I don't think there are any more, as far as that goes.

Mr. Jones: I remember there were—well, I think that's probably right that those were the only—

Mr. Winter: I think there are two of them here, Mr. Jones.

Mr. Jones: Huhm?

Mr. Winter: There are two of them here. Of course the billings, that is, the book shows the account on the Seattle Hardware Company, within the Occident Trust Company—

Mr. Jones: Well now, I—I don't know where you got—we furnished these to you, didn't we? Well, I'd like to include these in—in this—

Mr. Miller: You can put these in if you want to.

Mr. Jones: —include these in Exhibit 3, with that explanation that we referred to.

Mr. Miller: All right..

The Court: That may be entered.

Mr. Jones: Now this—this file [99] here that

is part of Exhibit 3, is significant only with respect to—it—it has on the front of it a letter from the City of Seattle Department of Public Works, dated April 7th, 1909, but it contains in the file a grant from Stetson-Post Mill Company to the Occident Trust Company for encroachment by reason of the construction of the new building; and that is the only significant part of that file, but I didn't want to destroy the file.

Mr. Miller: Here's another one if you want to put—include that along with the others.

Mr. Jones: I'm perfectly willing to put it in the—

Mr. Miller: That goes in your file, doesn't it?

Mr. Jones: All right. Well, put it in this Exhibit 3.

Mr. Miller: That will be part of Exhibit 3, then.

Mr. Jones: All right.

Mr. Miller: Just so there will be no confusion about these papers, they're miscellaneous papers and they can all be marked as Exhibit 3? [100]

Mr. Jones: Part of Exhibit 3.

Mr. Miller: Exhibit 3.

The Court: They may be so marked.

Mr. Jones: All right. Now those two that you have should go along with it.

Mr. Miller, are there any things that you have asked us to produce that we have—I have not produced?

Mr. Miller: Yes, I think you produced—we wanted—we wanted the books of Seattle and Occident.

Mr. Jones: Oh, yes. Yes, stock records a and b.

Mr. Miller: The stock book of Seattle. We asked you to produce that stock book.

Mr. Jones: No, I didn't understand it that you had asked for it. Is there some particular thing?

Mr. Winter: We wanted—at that time we wanted you to stipulate. As you recall, no stock was ever issued to Mr. Bronson for the land which he took title to.

Mr. Jones: By Seattle Hardware Company?

Mr. Winter: By Seattle Hardware Co. [101]

Mr. Jones: I—I will admit that so far as we can ascertain from the records, no stock appears to have been issued by the Seattle Hardware Company to Ira Bronson in connection with Lots 1 and 2 of Block 327, Seattle Tidelands. Does that meet your requirement?

Mr. Miller: Let the record show it is so stipulated.

Mr. Jones: Or that the Occident Trust Company issued stock.

Mr. Miller: Seattle never issued any of its stock to the Occident Trust Company. That's true.

Mr. Jones: Well, I think that's true. I can't conceive any circumstance under which Seattle would issue any of its stock to the Occident Trust Company.

Mr. Miller: Will you stipulate to that?

Mr. Jones: I will stipulate that we can find no record of any such transaction. Now, if I find—I—I—this is something that I didn't know you

wanted. If I find that there is anything to the contrary, why, we will let you know immediately, but I—I don't think there is a thing [102] on that.

Mr. Miller: Now, do you have that stipulation—

Mr. Jones: Suppose we offer the books and either party can refer to whatever portions of them they desire.

Mr. Miller: Do you want to offer the whole book?

Mr. Jones: Yes, we might just as well.

Well then, I'll—I'll offer as Plaintiff's Exhibit 8, a book of accounts—

Mr. Miller: Why not just offer this one page, page a hundred and ninety, and that's all that's necessary.

Mr. Jones: Well—

Mr. Miller: Unless you want to put it all in.

Mr. Jones: I can't tell from—it might be that some of your contentions will necessitate reference to some other parts of the book. From my standpoint, I don't see that any reference to the book is material now, but I might want to refer to something else.

Mr. Miller: Let's offer the [103] entire book.

Mr. Jones: Yes.

The Court: You're offering the entire book, with particular reference to a page in the book?

Mr. Jones: Mr. Miller has a reference to some particular page, but I think—as I understand, either party may be at liberty to call attention to other portions of the book.

The Court: Very well.

Mr. Miller: You offer the book, then, with particular reference to pages 190 and 191 of the book, which is the account of the Occident Investment.

The Court: Very well.

Mr. Jones: That will be as Plaintiff's 8.

Mr. Miller: Now did you identify that as to what number the book of Seattle—

Mr. Jones: No, I haven't identified it.

Mr. Miller: I just thought that—this is the ledger, and I understand that is the journal, is that right?

Mr. Jones: All right. Exhibit 8, [104] is general ledger (a)—

The Court: Of what corporation?

Mr. Jones: —of the Seattle Hardware Company, and I'll offer as Exhibit 9, private ledger (b)—is that correct? Private ledger (b).

Mr. Winter: That's a general ledger, too, isn't it?

Mr. Jones: Well it's marked on the back "Private B," of the Seattle Hardware Co. and it has—

Mr. Winter: That follows—the entries in (a) follows in (b) with this account beginning with the Occident Investment Company in 1901 and this goes on through 1906, or seven or eight months after the date of February, 1906. This is a continuance of "8," Exhibit 8, then.

In case Your Honor wants to find those pages, they are on page 175, 176 and 177, and then there is one or two other pages in there with that account.

Mr. Jones: Now, in the back of this book, Exhibit 9, is a book entitled "Private Journal E." Do you want that in, Mr. Miller?

Mr. Miller: Well, it might as well go in along with the rest of it. I think—I think we do, yes.

Mr. Jones: Well, let—let it remain then where it is as a part of this exhibit.

Mr. Miller: All right. [105]

Mr. Jones: Is there anything further that you have asked us to produce?

Mr. Miller: Nothing except what I have here and I'll put these in evidence.

Mr. Jones: All right.

The Court: I would like to ask this question in connection with the mortgage, which has been offered in evidence here as Plaintiff's Exhibit 6.

This mortgage makes specific reference to a fire insurance policy in the sum of a hundred and twenty-five thousand dollars that had to be carried on the property from and after the date of the mortgage. Is there anything in these books or records, or do you have any record of that fire insurance policy, the premiums that were paid thereon and by whom they were paid?

Mr. Jones: We—we have nothing—well, we do not have any copy of the policy. I would just be speculating if I undertook to answer Your Honor's question.

The Court: I think that the mortgage indicates that the party who placed it of record for filing, and to whom it was returned afterwards, it was filed

with the Thomas Investment [106] Company, were also the agents of the fire insurance company, who wrote the policy, and evidently collected the premiums.

Mr. Jones: Mr. Bronson represented that company, too, so I knew a good deal about the Thomas Investment Company, Mr. Hollen. When this case came up, I—he died many years ago—they had transferred the business to another concern, I've forgotten the name of it, but there is a successor; and I endeavored to get any records, but they said they have no—none of the records that far back, that they had not been kept.

Mr. Miller: May we stipulate, Mr. Jones, that the note that this mortgage secures, that's Plaintiff's Exhibit 6, has been lost, but that the original note was signed by the Occident Trust Company, and by the Seattle Hardware Company as guarantors?

Mr. Jones: May I see the note? Well, it was in the minutes; well, whatever is in the minutes would be there, and I—

Mr. Miller: Let's stipulate that the original note is lost.

The Court: Well, the mortgage itself recites that the note must be signed by the [107] Occidental Trust Company and the Seattle Hardware Company.

Mr. Jones: I—I think counsel—

The Court: Not as guarantor, but it just merely—it doesn't prescribe any guarantor, but merely—

Mr. Jones: I think counsel is correct, but I don't know—

Mr. Miller: I believe the mortgage would be sufficient.

Mr. Jones: The Plaintiff rests.

(Plaintiff rests.)

Mr. Miller: Now the defendant offers in evidence, Defendant's Exhibit A-1, which is a receipt signed by the City Treasurer of the City of Seattle, dated November 14th, 1902, showing a receipt of three hundred and thirty-six dollars and eighteen cents, for local improvement tax on Lots 1 and 2, showing it as having been received from Ira Bronson.

Mr. Jones: No objection. [108]

The Court: It will be admitted in evidence.

(Whereupon the receipt referred to and identified, was admitted in evidence as Defendant's Exhibit A-1.)

Mr. Miller: Now Defendant offers in evidence, Defendant's Exhibit A-2, which is a similar receipt showing received from the Seattle Hardware Company, six hundred and thirty-six dollars and thirty-three cents for local improvement tax on the East Twenty Feet of Each of Lots 1 and 2, in Block 327, of Seattle Tidelands Addition, signed by the Treasurer of the City of Seattle.

The Court: On what date?

Mr. Miller: November 22nd, 1902.

Mr. Jones: No objection.

The Court: It will be admitted.

(Whereupon the receipt referred to and iden-

tified, was admitted in evidence as Defendant's Exhibit A-2.)

Mr. Miller: Defendant offers in evidence, Defendant's Exhibit A-3, which is a receipt from the Treasurer's office, Seattle, King [109] County, Washington, received from Mr. Baker—I can't read—

Mr. Jones: F. W.

Mr. Miller: —his initials. F. W. Baker, address, Seattle Hardware Company, showing taxes for the following described property for the year 1903. It includes the Seattle Tidelands, Lots 1 and 2, in amounts of five hundred and thirteen dollars and fifty cents, three hundred and ninety-six dollars and seventeen cents, and also taxes on four other lots at small valuations and in small amounts, total payment being eight hundred and eighty-nine dollars and seventy-eight cents, and I don't see any date on this receipt. Is it dated?

Mr. Jones: Well, it's marked "paid" March 15, 1904. It's 1903 taxes.

Mr. Miller: Paid, yes. It's marked "paid" March 15, 1904.

Mr. Jones: No objection.

The Court: It will be admitted.

(Whereupon the receipt referred to and identified, was admitted in evidence as Defendant's Exhibit No. A-3.) [110]

Mr. Miller: Defendant offers in evidence, Defendant's Exhibit A-4, which is a receipt from the Treasurer's office, Seattle, King County, Washing-

ton, showing payment of taxes for the year 1904. It's made out to S. W. Baker—F. W. Baker. It showed that payment was made on March 15, 1905, the total payment sixteen hundred and thirty-three dollars and eighty-five cents.

Mr. Jones: No objection.

The Court: It will be admitted in evidence.

(Whereupon the receipt referred to and identified, was admitted in evidence as Defendant's Exhibit No. A-4.)

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### JOHN B. MEALS

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Miller:

- Q. State your name, Mr. Meals.
- A. John B. Meals, M-e-a-l-s.
- Q. And your business or occupation?
- A. I'm a Certified Public Accountant. [111]
- Q. You're employed by the Seattle Hardware Company—— A. Yes.
- Q. —the plaintiff in this action? And have you made an examination of the book account of the Occident Investment Company as it appears in the private ledger——

The Court: If you will pass your documents to the bailiff, Mr. Miller, the rule in this court is

(Testimony of John B. Meals.)

that the counsel remain back of the rail and the bailiff will pass the documents to the witness.

Mr. Miller: Yes, sir.

The Court: If you will get it, Mr. Bailiff. You'd better stay close there. He says it is.

Q. This is the account of the Occident appearing on Seattle's books. Now, you find that account, do you, Mr. Meals? You do?

A. I see an account "Occident Investment Company," is that what you are referring to?

Q. That's—that's it, the account. How was that account captioned or labeled in the beginning? Was it labeled "Occident Investment Company" or "Occident Trust Company"?

A. Well, the one that I have in my hand, it seems to be [112] dated 1901—

The Court: Speak up so we can hear you.

A. —and it is labeled "Occident Investment Company."

Q. Does the account show when it was first corrected to read "Occident Trust Company"?

A. No, sir, it doesn't.

Q. There is nothing in the account to indicate—does it indicate that it ever was changed over to the Occident Trust Company?

A. This is an account for one year. Then it goes into succeeding ledgers after it's closed.

Mr. Miller: Would you pass this book to him and—

Q. I'll ask you to turn to see if there is anything in the second account—

(Testimony of John B. Meals.)

Mr. Jones: Would you just tell us what exhibit you are looking at?

The Court: What exhibit is it?

Mr. Miller: Exhibit 9. Exhibit 9.

The Court: 9-A, isn't it?

The Clerk: 9.

Q. Making special reference to July 1st, 1904, see if you can find any record showing a change in the name of the account about that date. [113]

A. At that point the name changes to Occident Trust Company.

Q. Now I wish you would turn to Exhibit 8, that's the first ledger, is it not? And taking the—some of the items appearing in that account, there is an item under date of April 19th, 1901, "Revenue stamps, twelve dollars." Do you find that?

A. Yes, sir.

Q. Do you find any—anything indicating what those revenue stamps were? A. No, sir.

Q. Those were—that was on the same day, was it not, that the deed was first made to Mr. Bronson?

A. I don't know, sir, I didn't follow that so closely.

Q. Does that item show—what does that item show with reference to a charge of that amount to the Occident Investment Company, or a payment by the Seattle Hardware Company?

A. Well, it simply shows a charge against a book account which is entitled "Occident Investment Company"—

(Testimony of John B. Meals.)

The Reporter: A little louder, please.

A. It shows a charge against a book account labeled "Occident Investment Company," for twelve dollars, [114] and it's described as "Rev Stamps." That's all I know about, of course.

Q. Now, going down the line a little bit further, with reference to some other items, do you find some items of rent, under dates of May or June, 1901?

A. No, I don't see any.

Q. Well,—or in April, 1901. Right at the very first of that account, don't you find three items showing a rent credit?

A. The word "rent" doesn't appear here, Mr. Miller.

Q. Do you find an item labeled Jones—Jones and McCoy, rent— A. That's correct.

Q. —AC, rent account. How much is that item?

A. The first item seems to be May 31st, for four hundred twenty-five dollars.

Q. Now what does that—what does that account indicate with reference to how it was handled on the books?

A. Well, it indicates that this—the man in charge of these books received some rent and credited it to this Investment Company account, that's all.

Q. It indicates that the Seattle Hardware Company collected the rents and credited it to Occident Trust Company. A. Yes, sir. [115]

Q. Or, Occident Investment Company, as it was

(Testimony of John B. Meals.)

then carried. Now, going down the line, does the account show anything with reference to such items as the purchase of nails, or lumber, or glass, such as would indicate repairs that were made on—on a—on the building, or on property then on the lots?

A. Yes, there has been several number of small items of nails, lumber—

Q. How were those items handled, what would the—the account indicate with reference to what happened as to those items?

A. It indicates that the account either purchased from the Seattle Hardware Company or had paid for the—

The Court: Now if you will speak up a little louder, I'm having difficulty to hear you.

A. It indicates that the Seattle Hardware Company either sold these items to this account, or paid somebody for these items for this account.

Q. And are those items charged to the Occident Investment Company? A. Yes, sir.

Q. They're debited to the Occident Investment Company? A. That's right. [116]

Q. Now going down the line to another item, showing cash, sixty thousand dollars, as of August 20th, 1901. Do you find that item?

A. Yes, I find an item "Cash Book 445," that's the only indication on it, sixty thousand dollars debit.

Q. Now right above there is an item showing a credit to cash of fifty-eight thousand, five hundred dollars on the preceding day.

(Testimony of John B. Meals.)

A. That's right.

Q. Now what—can you explain those items, as to what those items indicate?

A. Well, I can't from the ledger, explain those items, because they are posted in blank. They have no reference and anything that I made out of that would be a pure assumption.

Q. Well, do—do the items indicate that—that the Seattle Hardware Company expended sixty thousand dollars in cash for some purpose, and charged that item to the Occident Investment Company?

A. That would be the first indication, but the offsetting credit is what raises my doubt about it. I wouldn't know how to put those two together, and they obviously belong together.

Q. You mean the credit of fifty-eight thousand five hundred dollars? [117] A. Yes, sir.

Q. That's the credit you're speaking about. Does that indicate to you that it was handled through some sort of a refinancing operation, by the Seattle Hardware Company?

A. Well, it has that appearance, yes, and that might be one answer to this.

Q. The Occident Company, then, was credited with fifty-eight thousand five hundred dollars, and debited with sixty thousand dollars?

A. Yes, sir.

Q. On two succeeding dates; and there is no explanation that you are able to find as to just how those items were handled?

(Testimony of John B. Meals.)

A. That's correct.

Q. Now going—can you follow this down through to 1902? I want to ask you about an item—

The Court: Let me ask you a question there, if I may. Then the sum total of those two entries would be that the Occidental (sic) Trust Company was indebted to the Seattle Hardware Company in the sum of fifteen hundred dollars.

The Witness: Yes, sir.

The Court: The difference between those two figures. [118]

The Witness: If we put them together, and I'm not sure that should be done. I have no explanation for the two entries.

Q. Now can you follow these accounts on down till we come to—well, let's first get into the year 1902. Do you find that year? You may have to go to the other ledger to find it.

First take an item as of February 18th, 1902, "Interest on sixty thousand dollars, fifteen hundred dollars." Do you find that item?

A. No, sir. I find on that date that interest—apparently Capitol Bank, something like that, eight hundred and seventy-five; and interest, Seattle National Bank, six twenty-five, which makes up the total, I suppose.

Q. Makes a total of fifteen hundred dollars.

A. That's right.

Q. And that was interest paid on sixty thousand dollars, was it? Does it show the principal or the amount the interest was paid on?

(Testimony of John B. Meals.)

A. It doesn't show the principal here.

Q. Then there's an item on—

The Court: Who—does it show who paid that?

The Witness: It simply shows that [119] the Occident Investment Company was charged interest in those two amounts. That's as far as I can go. Anything else would be an assumption.

The Court: I see.

Q. Wouldn't that indicate, in view of the nature of the account, that the Seattle Hardware Company paid that fifteen hundred dollars and charged it to Occident Trust Company?

A. Yes, sir.

Q. It would. Now on March 15th you have an item of taxes, three hundred and nineteen dollars and thirty cents. Do you find that item?

A. Yes, sir.

Q. And would it be true, Mr. Meals, that that item would indicate that Seattle Hardware paid those taxes and charged them to Occident?

A. That's right.

Q. Now coming—I want to ask you about one or two more of these, just to get the general character of these items. I think that—can you find—can you come down to 1904, the year 1904. First, I want to take an item of March 31st, 1904. Do you find that? A. Yes, sir. [120]

Q. Do you have an item there marked "Capital Stock, sixty thousand dollars; bills payable, sixty thousand dollars," both debits on this account? Now, what does that item indicate?

(Testimony of John B. Meals.)

A. Well, I have an item marked with no reference, except the private journal, one hundred twenty thousand dollars.

Q. That's a debit to Occident of a hundred and twenty thousand dollars.

A. That's right, but there is no description in the ledger.

Q. There's no description in the ledger as to what that was. Is there any tie-up showing how that ties up in any way with the other sixty-thousand-dollar item that you've testified about?

A. I can give you the—I can read you the journal which results in this posting to the ledger.

Q. All right, if you'll do that.

A. The journal debit is Occident Investment Company, one hundred twenty thousand dollars, and the credit is to the capital stock, that is, capital stock of Seattle Hardware Company, sixty thousand dollars, and the additional credit is to bills payable of Seattle Hardware Company, sixty thousand dollars.

Q. Now, what would that indicate to you? [121]

A. Well that indicates—that indicates in the first, this is an assumption now, I should have to go further into these transactions, but I'm just trying to bring out the assumption that—that's what you want to know, isn't it?

Q. Yeah.

A. All right, it indicates that the Seattle Hardware Company assumed a payment of bills payable

(Testimony of John B. Meals.)

and charged them against Occident; in other words, it indicates to me that Occident owed sixty thousand dollars of bills payable, which was assumed by the Seattle Hardware Company. And the second half indicates that they considered their investment in the Occident Investment Company worth sixty thousand dollars more than the book showed and they credited their capital stock by way of appreciation.

Q. Well, do you find any record anywhere in this account where the Occident Trust Company owed any indebtedness of sixty thousand dollars? As assumed?

A. No, sir, I don't.

Q. You don't know what that sixty thousand dollars was referred to, they—that was assumed. Could it have been the original purchase price of the lots in question? [122]

A. Well, it's the same amount, and it could have been. I wouldn't know.

Mr. Miller: I think that's all, Mr. Meals.

#### Cross-Examination

By Mr. Jones:

Q. Mr. Meals, do you find anything to distinguish between the account labeled Occident Investment Company and the account as it becomes Occident Trust Company, or does it appear to be all one account?

A. Well, I seemed to have lost track here at the moment. Perhaps Mr. Miller can tell me what that date was.

(Testimony of John B. Meals.)

Mr. Miller: What was that date you referred to?

The Witness: The date of the change in title.

The Court: It was 1901 to 1902, I think.

Mr. Miller: I'll give you that date in just a minute. July 1, 1904.

The Witness: 1904. [123]

The Court: Yes, that's right.

A. There is no indication why the title should be changed, the balance goes right forward from Occident Investment Company to Occident Trust Company.

Q. Now is there anything in these accounts that you've just been referring to, and that you have before you, to indicate whether or not they represented a separate activity of some concern which is labeled "Occident Investment Company" or "Occident Trust Company" as distinguished from Seattle Hardware Company?

A. Well, these accounts have the appearance of being accounts the same as they would have with any customer or any-anybody to whom they were selling merchandise.

Q. Does it imply a separate entity then, that—

Mr. Miller: I think I'll object to that.

The Court: Oh, he may answer.

Q. You may answer, Mr. Meals.

A. Well, the account title is "Occident Trust" or "Investment" or what have you, and just looking at this it would imply they are doing business with them the same as they would some other hard-

(Testimony of John B. Meals.)

ware [124] company or some vendor, or anybody else. In other words, they—they don't have the appearance of an income account or an expense account, or an account which belongs to the company, an investment account, if that's what you mean.

Mr. Jones: That's all.

The Court: Well, what did you mean by saying this second sixty thousand dollars was an appreciation to the Seattle Hardware Company for their investment, or did I misunderstand you?

The Witness: I said that I assumed it was appreciation, because they credited their capital in that amount. That's the usual—

The Court: You mean the Seattle Hardware or the Occident—

The Witness: Seattle Hardware credited its capital in that amount, and charged it—its account with Investment—

The Court: I see.

The Witness: —in that amount.

The Court: I just wanted to get it clear. I was afraid that I had confused the two corporate entities. That's all. I just wondered.

Mr. Miller: Your Honor— [125]

The Court: I think it's about time to—

Mr. Miller: I—I could finish here in five minutes, if your Honor wants to give me that long, and we would be through.

The Court: Very well.

(Testimony of John B. Meals.)

Mr. Miller: Will you mark these exhibits—

The Court: I understood you had a deposition that you filed.

Mr. Miller: No.

Mr. Jones: No, the deposition is being written and it won't be available until sometime tomorrow and possibly the next day, and the understanding we had was that, if it's agreeable to your Honor, that we can just—

The Court: Yes, I understand that.

Mr. Jones: —we will send it on over, and the case can be closed, except for that.

Mr. Kehoe: I don't assume your Honor would want us to get on the stand and read it to your Honor—

The Court: No, I don't mean read it, but just getting it into the record, but it would—it could be part of the record. [126]

Mr. Jones: We could file it as an exhibit in the—one of the Plaintiff's exhibits, can't we?

Mr. Miller: Yes, it can be received by agreement. We would be perfectly willing to have them file it.

The Court: You stipulate that it may be received as an exhibit in the case, or that it should be, by the court reporter, made a part of his record of the testimony of it.

Mr. Miller: It can be done either way. It's immaterial to us, whichever way you prefer to have it done.

(Testimony of John B. Meals.)

The Court: Well, when you get your statement of facts in the case, then of course the exhibits are separated from the oral testimony.

Mr. Miller: Well, maybe it better be made a part of the testimony in the case.

Mr. Jones: I—I think so.

The Court: That's all right.

Mr. Jones: Might—might be consider that between us, and when—we can indicate when we send it over which way it should be handled?

Mr. Miller: All right. Anything you—— [127]

The Court: I think it should be—if it's met all formalities of taking a deposition, I assume you agreed on that.

Mr. Jones: Yes, we did.

The Court: But it ought to become a part of the testimony.

Mr. Jones: Well, I think that's right. I think it should be made a part of the record.

Mr. Miller: Now, your Honor, I want to offer in evidence, the income tax returns that have been filed by the—and the excess profits tax returns, that have been filed by the Seattle Hardware Company for the years involved in this case, and also for the year 1940. I haven't had time to get photostats made before leaving Washington. I'd like to offer them in evidence, and we could withdraw and substitute photostatic copies.

Mr. Jones: What is the purpose of putting these in the record? I thought we had covered that—everything that related to them, by stipulation.

(Testimony of John B. Meals.)

Mr. Miller: Well, the purpose of the returns for all of the years was to show the [128] manner in which the plaintiff itself treated its invested capital. It's not conclusive of the plaintiff, we can see that; but it is evidence where the plaintiff itself sets forth the amount of invested capital it's entitled to, so it's offered, in other words, as sort of an admission against interest on the part of the plaintiff.

The Court: In reference to this particular problem.

Mr. Miller: That's right. In reference to the amount of the loss that was claimed, and also with reference to the amount of invested capital which the plaintiff claimed.

Mr. Jones: Well, I—I think I would have no objection to that, and I do not object to your substituting copies. I—

Mr. Miller: I'll make you a copy, if you would like to have it.

Mr. Jones: All right. I think our stipulation shows that sometime prior to the taxable years here involved they were required to use this basis, does it not? Does it, Mr. Kehoe?

The Court: Well, does your stipulation take care of depreciation from the date of the construction of the building down to [129] the years involved?

Mr. Jones: Yes, it does. We've agreed—

The Court: And that during a part of that construction period that the building was—

Mr. Jones: Yes, we—

(Testimony of John B. Meals.)

The Court: —held by—

Mr. Miller: That's not an issue in the case.

Mr. Jones: No. No, that isn't involved here. I know what counsel is talking about, but I thought we had covered it, Mr. Miller.

Mr. Miller: Well, let's see. I don't think so.

Then—then may I have—we withdraw the returns.

The Court: Yes, you may.

Mr. Miller: I'll take them back with me and I'll send in the copies.

The Court: All right.

Mr. Miller: Now the only other thing I had, I wanted to read to the Court a paragraph from the annual report to the stockholders of the Seattle Hardware Company for the year ending December 31st, 1905. This is an annual [130] report which was pasted into the minute book, Plaintiff's Exhibit 2, and the paragraph that I am reading is as follows:

The heading—Annual Report to the Stockholders of the Seattle Hardware Company for the year ending December 31st, 1905.

The year 1905 witnessed the completion of our new building. Thanks to the efforts of our building committee, we are now in a very comfortable home, well equipped to handle easily a business of two million dollars or more, which we propose to have for the year 1906.

The defendant rests.

(Testimony of John B. Meals.)

The Court: Is that page marked or indicated in any way, that you have read from?

Mr. Miller: I don't think it is, your Honor.

It's on—it's a —it's on page twenty-nine of the minute book. It's a sheet pasted over page twenty-nine.

Mr. Jones: Now, have these been [131] numbered?

The Court: Not yet.

Mr. Miller: Not yet. I would like to have it—get it numbered and have it received in evidence.

The Court: And you propose to substitute photostatic copies of those?

Mr. Miller: That is right.

The Court: That may be done.

Mr. Miller: We can probably give them one number.

Mr. Jones: Well yes, and I just want to ask Mr. Meals something about them, and I wanted to refer to them by number.

Mr. Miller: Give them one number, and show that they are all in evidence, subject to the right to substitute copies.

Mr. Jones: Mr. Meals, I would like to ask you something about Plaintiff's—or, Defendant's A-5. These are the income and excess profits returns of the Seattle Hardware Company for 1940 to 1945, as I understand it. I haven't had an opportunity to examine them.

The Witness: Yes, sir.

(Testimony of John B. Meals.)

Mr. Jones: But—as I understand [132] it also, they make a return or a declaration with respect to excess profits credit and possibly with respect to loss. That is different from the claim that the plaintiff is making in this suit. Did you prepare those returns?

The Witness: Yes, sir.

Mr. Jones: If it is a fact that there is a variance, can you tell the Court why you made them on the basis that you have made them?

The Witness: Well, the first income—the first excess profits tax question arose in 1940, that is, at the end of our fiscal year, November 1940. At that time we claimed as invested capital all these amounts which I—is being discussed today, and at some later time when the Revenue Agent came along, Mr. Black, when he made his report, he reduced this claim “Invested Capital Credit” by some hundred and twenty thousand dollars, which again, is the sort of thing we are talking about today.

The Seattle Hardware Company was in the peculiar position that in some years it was on the “Invested Capital Credit” basis, and in other years it was on the average of 1936, '39 earnings; but as long as only the invested capital [133] credit was involved, the amount there being some eight per cent of twelve hundred and, you know, was just too small to argue about and we didn't care to engage in the discussion during the war and keep all these years open, so that we acceded to the Revenue Agent's

(Testimony of John B. Meals.)

treatment and handled it that way until 1945. At that time this sale was made, and of course it became material to us and important to us to claim the original basis, which we had claimed in 1940.

And of course at that time we were obliged to re-open these old years by way of operating loss and carry-back.

Mr. Jones: That's all.

Mr. Miller: Let me ask you one question. What basis did you use for supporting the loss in 1945?

The Witness: Well, we used the same basis that we used on the returns, for the simple reason that we knew that this would have to be a claim for refund. There wasn't enough tax involved in 1945 to offset our loss, and we had to get it by way of refund anyway.

Mr. Miller: Well, you knew you didn't have to report this? [134]

The Witness: Pardon?

Mr. Miller: You knew that you didn't have to use this basis in the return, just because the Revenue Agent determined—

The Witness: All I can say is that I thought it was good judgment at that time, and being fully aware of this background of the claim that we intended to make.

Mr. Miller: And all of these other years you reported your invested capital, using the old base—the basis that had been determined by the Revenue Agent and was satisfied to proceed on this basis.

(Testimony of Charles S. Wills.)

The Witness: That is correct, yes, sir.

Mr. Miller: That's all.

Mr. Jones: That's all, Mr. Meals.

The Court: Now both sides rest, excepting the introduction in evidence of the deposition?

Mr. Jones: Except for the deposition.

The Court: And that will be introduced into this record as the Plaintiff's deposition—— [135]

Mr. Jones: Yes, sir.

The Court: —or Defendant's?

Mr. Jones: I know that Mr. Miller would like to submit this case on briefs, and I think that it is the proper way to submit the case.

The Court: It certainly is if we deal with the legal phases of it; but on the factual issue, there is—it's just a matter of what the facts establish and what inferences you draw from them.

I see no reason for any extended brief, because first the fact must be determined, and the primary fact here is, was this property originally acquired by the plaintiff through agents, trustees, and other representatives, based upon this record as it is made, when we get the rest of it; or was it not. If it was, then that fact if it were determined in the affirmative, would—wouldn't call for these—I don't know just what your calculations would result in. And I'm willing to have you submit the—a written brief upon that; but I wanted to clear that out of the way. And if I should determine that this was a corporation that must be looked upon as separate

and apart from the plaintiff corporation, and that the plaintiff [136] corporation made the investment that they contend for in their complaint here, then we get into these other questions.

Mr. Jones: Well, I—I know what your Honor has in mind. I think we can approach it that way. I think that the question, however, is not exactly as you stated, because the authorities that I am prepared to submit will show that even if the Seattle Hardware Company had acquired the land in its own name, and then turned it in to a bona fide separate corporation, that the same results would follow.

The Court: Was the Occidental Trust Company able by separate corporation or—

Mr. Jones: That—that—yes—that is—

The Court: —or was it mere alter ego—

Mr. Jones: Yes—

The Court: —of the Seattle Hardware Company, for the purpose—

Mr. Jones: Yes.

The Court: —of carrying through this transaction?

Mr. Jones: Yes, I think—I think [137] that is the real question, but not whether the Seattle Hardware Company first acquired the property as its own, or something of that kind, because even if it had first acquired it as its own, or even if its agent acquired it before it—before the Occidental Trust Company was formed, still if it was a bona fide separate corporation for a legitimate business pur-

pose, the result would be the same as if it had been formed wholly apart from the Seattle Hardware Company, in my judgment. Now—

The Court: Before any citation of authorities becomes useful in this matter, we must make a disposition of these facts, as we find them from the record as made.

Mr. Jones: And the—the determination of the facts, at the same time involves to some extent the authorities as to what is recognized as a bona fide separate company, or what in law is regarded as simply an alter ego, not to be given a separate identity. There—that requires a consideration of legal authorities.

The Court: Well, I have quite a number of matters on the calendar. I don't want to superficially pass upon this case, though I [138] assume it will be appealed, however I may hold. And I don't want either, to have counsel delay with themselves and then, in turn, the Court, by briefs that cite authorities upon all the many phases of direct and indirect holdings of property and of direct trusts and indirect trusts, because we—

Mr. Jones: I think—I think we can get right down to very specific cases.

The Court: —can just brief the whole field of those things.

Mr. Jones: We've got some very direct authorities on what is recognized as separate holding or not. And I think that—I think I understand the—the limitation that your Honor desires us to follow in our opening brief, and if you indicate what time

you would like to have it, we can—I think we would like to have two weeks, wouldn't we, Mister—

The Court: I am perfectly willing that you do have two weeks on it.

Mr. Jones: If we should need a little more time, I take it that there is no objection to it. We will endeavor to get our first brief in in two weeks.

Mr. Miller: We will want the record transcribed, I suppose. Two weeks after we get the record.

Mr. Jones: Yes, I think we should have the record transcribed. Do you want to—and then if we can have two weeks from the time the record is available, why, we will undertake to meet that.

Mr. Miller: All right. Whatever time you take, I suppose we will take—

Mr. Jones: Oh well, you can—

Mr. Miller: —to handle it.

Mr. Jones: You may need more time than that.

Mr. Miller: Well, would it be too much to ask thirty days for the—

The Court: For your reply brief, you mean?

Mr. Miller: Yes.

The Court: I'm perfectly willing that you—that you should have—

Mr. Jones: We may—we may need 30 days because I anticipate that we may have more to say on our—our reply to you than we do originally. [140]

Mr. Miller: You mean that you'll take thirty on your opener?

Mr. Jones: No, of course not. We'll file or meet the opening in two weeks after the record is available.

Mr. Miller: And I take thirty days.

Mr. Jones: And you take thirty days, and we will try and get ours in as soon as we can, but we might want thirty days—I don't know.

The Court: If I had before me the deposition of the witness that will go into the record, and were a little more familiar with the stipulated facts—I have hurriedly glanced through them—I probably would find it comparatively easy to make a disposition of the very first question that is bothering the Court, and that, did Mr. Bronson put his own sixty thousand dollars into the property, or did the Seattle Hardware Company. Now have you stipulated on that fact?

Mr. Jones: We haven't stipulated, but I—there is nothing in the record to show that Mr. Bronson put his own sixty thousand dollars into the property; neither is there anything definitely to show whose sixty thousand he put in. It looks as if they may have borrowed the money from some financing agency, on the property. [141]

The Court: That is, who borrowed it?

Mr. Jones: Occident Trust Company.

Mr. Miller: The Seattle Hardware Company.

Mr. Jones: Well, that's—that's a question. We can't tell—

The Court: Well, the Occident Trust Company wasn't in existence at the time of the original acquisition of the property, was it?

Mr. Miller: Yes, it was.

Mr. Jones: Yes, it was.

Mr. Miller: Four days, I think.

Mr. Jones: Yes.

Mr. Miller: It was organized—

The Court: It was then being carried on the books as the Occident Investment Company?

Mr. Miller: Yes, it was.

The Court: Well, I'm a little confused there. I thought the Investment Company was—

Mr. Jones: No, that—

The Court: —the name assumed prior to the coming into being of the corporate entity, but I—

Mr. Miller: It didn't get the [142] properties until October 1903. It was carried in Bronson's name until then.

The Court: Well—

Mr. Miller: Now there is one other thing, Your Honor, that may—in preparing these briefs, I was wondering if it would be possible for both parties—I'm speaking for myself, and I am sure Mr. Jones would join me in this—to withdraw the original exhibits and give a receipt for them, for use in preparing the briefs.

The Court: Unless there is some objection.

Mr. Jones: No, there is no objection.

The Court: That may be done, and a minute entry might be made to the effect that either party may withdraw exhibits for the purpose of preparing briefs.

We will adjourn court until ten o'clock tomorrow morning.

(Whereupon adjournment was taken until 10:00 o'clock a.m., May 5, 1948.)

[Endorsed]: Filed USDC June 4, 1948. [143]

United States District Court, Western District  
of Washington, Southern Division

No. 1059

SEATTLE HARDWARE COMPANY,  
Plaintiff,  
vs.

CLARK SQUIRE, Collector of Internal Revenue,  
Defendant.

### OPINION

This is an action brought under section 24 (5) of the Judicial Code as amended and as qualified by section 3772 of the Internal Revenue Code as amended, for the recovery of income and excess profits taxes, alleged to have been erroneously and illegally assessed and collected for the fiscal years 1941 to 1945, inclusive, excepting the year 1942.

The question presented here is whether the corporate entity of the Occident Trust Company should be recognized in connection with the record ownership of certain real property prior to the time such property was formally transferred by it to plaintiff herein, the Seattle Hardware Company, on February 21, 1906. The question is succinctly stated by plaintiff in its brief, to wit: Was the property owned by Occident Trust Company or the Seattle Hardware Company?

I shall refer to the Seattle Hardware Company as "taxpayer" and to the Occident Trust Company as "Occident."

The taxpayer was organized as a corporation and began doing business, engaged in the wholesale hardware business in Seattle, in March, 1885. It prospered and expanded with the rapid growth of the city during the years following its establishment. A summary of the facts as I find them is that, in 1901, long before the days of federal income taxes, as well as before the days when workmen's compensation laws were in existence in this state, taxpayer desired to acquire two lots adjoining the one it then owned, upon which it intended to erect a building sufficiently large to meet its then needs and its needs through the future years.

A deed of conveyance, dated April 19, 1901, from Stetson & Post Mill Company to Ira Bronson evidenced the purchase of the property desired by taxpayer, the consideration therefor being \$60,000, which was paid by taxpayer. The purchase was made by Bronson as taxpayer's agent, and for the reason the taxpayer believed a better bargain could be obtained by dealing in this manner. Ira Bronson at all times held title to this property in trust for the true owner, the taxpayer.

On April 15, 1901, at the direction of taxpayer, Mr. Bronson, together with two other persons not identified with taxpayer in any manner, organized the Occident Trust Company as a corporation, and Bronson subscribed for the entire capital stock of this corporation, as is evidenced by its articles of incorporation. These articles of incorporation were filed with the secretary of state two days later,

April 17, 1901. On the same day that the articles of incorporation were executed by Mr. Bronson and his coinorporators, they all resigned. There was no stock certificate ever issued to Bronson by the corporation for all or any part of its capital stock, and neither money nor property passed from Mr. Bronson, nor any other person or corporation, to Occident for any of its capital stock. Occident never issued stock to anyone, as it kept no stock book. However, on the day of the execution of its articles of incorporation, following the resignation of its incorporators, M. D. Ballard, F. W. Baker, and C. H. Black, trustees and stockholders of the taxpayer, were elected to fill the vacancies of those resigned; and on April 18th, at a meeting of the stockholders of Occident, M. D. Ballard was elected president; F. W. Baker, treasurer; and C. H. Black, secretary, though they were not legally chosen for these positions since there was no one representing Occident either as incorporator or as stockholder to choose them.

On September 1, 1903, taxpayer set up a building committee to perfect plans for the erection of a building on the lots in question, legal title to which was then in the name of Bronson, its attorney. It employed architects and took all the essential steps for the construction of the building desired by it. It carried through all negotiations in the way of financial obligations for the construction of such building. It paid all the costs for the construction of the building, though it had them charged on its

accounts to Occident. It also, during this period of time, and in the whole period of time from the original acquisition of this property until the completion and acceptance of the building, paid all the taxes and assessments against the property; and it collected the receipts produced from certain minor rentals before the old buildings that stood upon the property were removed to make way for the new corporation.

On October 1, 1903, a warranty deed, executed by Bronson and wife to Occident, for a recited consideration of \$100,000, was placed of record. There was no actual consideration whatever passing from Occident to Bronson either in money or in stock. Construction of taxpayer's building, in accordance with its plans and specifications, under orders and directions of its building committee, was undertaken by taxpayer.

September 21, 1905, it having been found that additional funds would be required to complete the construction of the building, taxpayer negotiated for a loan of \$150,000 for the purpose of securing such funds. A note and mortgage were given, the mortgage being signed by Occident and the note by Occident and taxpayer, as well as by certain members of taxpayer's board of directors as individuals. The money produced by this mortgage went into the treasury of taxpayer, and all principal and interest on account thereof was paid by taxpayer.

On February 21, 1906, which was a few months after the completion of the building, a deed was

executed by Occident through its officers, who purported to act as such, conveying the property from Occident to taxpayer, subject to the existing mortgage of \$150,000. This conveyance was held by taxpayer until January 20, 1908, when it was filed for record. Thereafter, Occident entirely passed out of the picture, and taxpayer, which had previously paid the annual license fee of Occident, no longer made such payments, so that, in due time thereafter, under the laws of the State of Washington, Occident as a corporation was stricken from the rolls. There never was a liquidation of Occident, since it had no assets from the time it was incorporated until being stricken by the secretary of state for failure to pay its annual license fee.

The purchase price of the lots in question in this last transaction, the conveyance from Occident to taxpayer, was set up in the books of taxpayer as being \$225,000. This was the appreciated value of the property from the time it was first acquired by taxpayer in 1901 to the time of the formal conveyance by Occident to it.

In 1945, taxpayer sold the property here in question at a figure that would result in a substantial loss if its initial cost be considered as 225,000, the sum of money represented to have been paid to Occident upon conveyance of this property to it. If the base figure for cost be taken as the amount of money taxpayer paid through its attorney, Bronson, in 1901, for the acquisition of the property, \$60,000, then the sale of the property in 1945 would

show a profit and support the taxes assessed and collected herein.

It is clearly established in this case that taxpayer paid in actual money no more than the original \$60,000 which was furnished to Bronson, its attorney, when the property was purchased on its behalf. The property while in Bronson's name was held by him as the agent and representative of taxpayer and for taxpayer's use and benefit, subject to its orders and directions, and the same condition prevailed during all the time title stood in the name of Occident. The sole purpose and object of acquiring the property in question by taxpayer was to construct a building suitable for the business being carried on by it to meet its immediate and prospective needs. The passing of title from Bronson to Occident, and the holding of such title by Occident, was to relieve taxpayer from any liability that might arise during the course of construction of the building. The paper transactions relating to the ownership of this property did not remove it from the assets of taxpayer from the date of its acquisition in 1901.

Mr. Roy P. Ballard, who for many years was treasurer of taxpayer, is the only person now living familiar with the facts during the years here in question. He was in intimate touch with everything that took place during that time. He testified by deposition in this case, due to physical illness. His testimony, in a large measure, supports the facts as I have heretofore stated them.

The facts other than those testified to by Mr. Ballard are found in the documentary evidence introduced herein, particularly plaintiff's exhibit No. 5, being the only record of Occident, and which, I find, was the only record it ever had; plaintiff's exhibit No. 8, being the private ledger and monthly statement of taxpayer; and plaintiff's exhibit No. 2, the minute book of taxpayer.

From the facts as I have found them, we have presented the issue of law as to whether Occident ever, in fact, was more than a nominal holder of the property here in question. I am forced to the conclusion that it was not a corporate structure acting in any sense as an independent entity; and that it never was more than an instrumentality created by taxpayer temporarily to hold title for taxpayer, and nothing more, during its short and incomplete existence as a corporate structure. Its officers were only nominally such, since there was no one to choose them initially after the resignation of the original incorporators. At no time during its existence did it have outstanding any of its capital stock, because none had ever been issued.

The consideration of \$225,000 recited as going from taxpayer to Occident is a fictitious one, and the property here in question, at all times following the date of its acquisition by Mr. Bronson in April, 1901, was, and continued to be, the property of taxpayer. Its cost to taxpayer was the original \$60,000 paid therefor through Mr. Bronson; and this sum is the actual investment made by taxpayer upon

which it was entitled to calculate its liability for taxes during the years here involved, and as indicated by its income excess profits tax returns for those years.

It is clear that the only investment in money that taxpayer ever made in this property was the \$60,000 it furnished to its attorney, Bronson, for the acquisition of the property in 1901, and all that took place until formal conveyance by Occident to taxpayer of the property here, following the period of construction by taxpayer of the building, were acts of taxpayer, and not of Occident. This in no way added to the original cost of the property to taxpayer. In other words, looking through form and applying substance, as established by the facts, taxpayer had an actual investment of \$60,000 in this property; and, therefore, the figures used in making its tax returns during the years here involved must be accepted as correct.

Exceptionally able briefs have been submitted by both sides in this controversy. I can see no good purpose that would follow an analysis of the many cases cited. There is no serious dispute as to the law. The only issue of law is whether the facts bring this case within the well-known rule of "separate entity."

There are two cases that taxpayer relies upon very heavily. One is Haskell v. McClintic-Marshall Co., 1923, 289 Fed. 405, from this circuit, and the other is Moline Properties v. Commissioner of Internal Revenue, 1943, 319 U. S. 436. A reading of

these two cases readily distinguishes the facts in them from the facts here found. In the Haskell case, the distinction is at once noticeable because there the corporate structure was in all respects a completely organized corporation. It carried on activities within the limits of its articles of incorporation. It issued stock. It kept books and records. It assumed responsibilities, many of which were entirely independent of its parent, the banking corporation, and it had a purpose for its existence beyond that of being the mere alter ego or agent or conduit of its parent corporation. What is true of the Haskell case is also the situation in reference to the Moline case.

The plaintiff also cites, and relies upon, the following cases, among others, all of which the court has examined and finds them readily distinguishable on the facts:

Commissioner of International Revenue v.  
Laughton, 113 F. 2d 103;

Rogan v. Starr Piano Co., 139 F. 2d 671;

New Colonial Ice Co., Inc. v. Helvering, 292  
U. S. 435;

Higgins v. Smith, 308 U. S. 473.

The defendant cites, among many others, the following cases as establishing the exception to the general rule of an independent entity:

Minnesota Tea Co. v. Helvering, 302 U. S.  
609;

Gregory v. Helvering, 293 U. S. 465;

Commissioner of Internal Revenue v. Court Holding Co., 324 U. S. 331;  
Helvering v. Clifford, 309 U. S. 331;  
Commissioner of Internal Revenue v. Tower, 327 U. S. 280;  
Corliss v. Bowers, 281 U. S. 376;  
United States v. Brager Bldg. & Land Corp., 124 F. 2d 349.

The cases cited by defendant all support the conclusion here reached, that Occident was not an independent legal entity, but merely a fully controlled agency or instrumentality through which taxpayer operated.

Having determined the basis from which values must be calculated to be that upon which taxes have been paid, the plaintiff's action will be dismissed. Appropriate findings of fact and conclusions of law and decree may be submitted upon notice.

Dated this 30th day of December, 1948.

/s/ CHARLES H. LEAVY,  
United States District Judge.

[Endorsed]: Filed Dec. 30, 1948.

[Title of District Court and Cause.]

## PLAINTIFF'S OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff objects to the following proposed Findings of Fact on the grounds that each thereof is contrary to, and unsupported by the evidence in this case.

### I.

The first sentence of proposed Finding 7, reading as follows: "On or about April 19, 1901, Plaintiff purchased Lots No. 1 and 2, Block 327, Seattle Tidelands, King County, Washington, from Stetson & Post Mill Company."

The underlined portion of the third sentence of proposed Finding 7, reading as follows: "The consideration for the property was \$60,000 which was paid by the plaintiff."

The fourth, fifth and sixth sentences of proposed Finding 7, reading as follows: "The purchase was made by Bronson as plaintiff's agent and for the reason the plaintiff believed a better bargain could be obtained by dealing in this manner. From April 19, 1901, to October 1, 1903, Bronson held title to this property in trust for its true owner the plaintiff. At the time of the purchase of the property Bronson was plaintiff's attorney as well as its agent."

### II.

The following portion of proposed Finding 8:

"There were no stock certificates ever issued to Bronson by the corporation for all or any part of its capital stock, and neither money nor property passed from Mr. Bronson, nor any other person or corporation, to Occident for any of its capital stock. Occident never issued stock to anyone, as it kept no stock book."

### III.

The following portion of proposed Finding 9: "On September 1, 1903, plaintiff set up a building committee to perfect plans for the erection of a building on the lots in question, legal title to which was then in the name of Bronson, its attorney. Plaintiff employed architects and took all the essential steps for the construction of the building desired by it. It carried through all negotiations in the way of financial obligations for the construction of such building. It paid all the costs for the construction of the building; though it had been charged on its accounts to Occident. It also, during this period of time, and in the whole period of time from the original acquisition of the property until the completion and acceptance of the building, paid all of the taxes and assessments against the property; and it collected the receipts produced from certain minor rentals before the old buildings that stood upon the property were removed to make way for the new corporation."

### IV.

The following portion of proposed Finding 10:

"There was no actual consideration whatever passing from Occident to Bronson either in money or in stock. Plaintiff then undertook the construction of its building, in accordance with its plans and specifications, under orders and directions of its building committee."

## V.

All of Proposed Finding 11, reading as follows: "On September 21, 1905, it having been found that additional funds would be required to complete the construction of the building, plaintiff negotiated for a loan of \$150,000 for the purpose of securing such funds. A note and mortgage were given, the mortgage being signed by Occident and the note by Occident and plaintiff, as well as by certain members of plaintiff's board of directors as individuals. The money produced by this mortgage went into the treasury of plaintiff, and all principal and interest on account thereof was paid by plaintiff."

## VI.

The underlined portion of the first sentence of proposed Finding 12, as follows: "On February 21, 1906, which was a few months after the completion of the building, a deed was executed by Occident through its officers, who purported to act as such, conveying the property from Occident to plaintiff, subject to the existing mortgage of \$150,000."

The last sentence of proposed Finding 12, reading as follows: "There never was a liquidation of Occident, since it had no assets from the time it was

incorporated until being stricken by the Secretary for failure to pay its annual license fee."

## VII.

The last sentence of proposed Finding 24, reading as follows: "Plaintiff made no objection to the Commissioner's action for several years thereafter and used the \$60,000 basis in computing its invested capital credit in its returns for the fiscal years ended November 30, 1942, to 1945, inclusive."

## VIII.

The first sentence of proposed Finding 25, reading as follows: "Plaintiff paid in actual money no more than the original \$60,000 which was furnished to Bronson, its attorney, when the property was purchased on its behalf."

The third and fourth sentences of proposed Finding 25, reading as follows: "The sole purpose and object of acquiring the property in question by plaintiff was to construct a building suitable for the business being carried on by it to meet its immediate and prospective needs. The passing of title from Bronson to Occident, and the holding of such title by Occident, was to relieve plaintiff from any liability that might arise during the course of construction of the building."

## IX.

The first sentence of proposed Finding 27, reading as follows: "Occident was in fact never more

than a nominal holder of the property here in question."

The last sentence of proposed Finding 27, reading as follows: "At no time during its existence did it have outstanding any of its capital stock, because none had ever been issued."

## X.

The first portion of proposed Finding 28, reading as follows: "The consideration of \$225,000 recited as going from plaintiff to Occident is a fictitious one, and the property here in question, at all times following the date of its acquisition by Mr. Bronson in April, 1901, was, and continued to be, the property of plaintiff. The cost of Lots 1 and 2, Block 327, Seattle Tidelands, King County, Washington, was the original \$60,000 paid therefor through Mr. Bronson."

## XI.

The first sentence of proposed Finding 29, reading as follows: "The only investment in money that plaintiff ever made in this property was the \$60,000 it furnished to its attorney Bronson for the acquisition of the property in 1901."

The last portion of proposed Finding 29, reading as follows: "This is no way added to the original cost of the property to plaintiff. In other words, looking through form and applying substance, as established by the facts, plaintiff's actual investment in the lots and buildings was represented by the actual unadjusted cost of \$60,000 for the two

lots and \$244,000 for the buildings. Therefore the figures used in making its tax returns during the years involved as adjusted by the Commissioner must be accepted as correct in determining gain or loss on the sale of the property in 1945, and in computing invested capital credits for the fiscal years ended November 30, 1941, to 1945, inclusive.”

Plaintiff objects to the following proposed Findings of Fact on the ground that each thereof is not a proper finding of fact, but the statement of a conclusion of law, and that each thereof is unsupported by the Findings of Fact and is contrary to and unsupported by the evidence in this case.

### I.

The following portion of the last sentence of proposed finding 8, reading as follows: “though they were not legally chosen for these positions, since there was no one representing Occident, either as incorporator or as stockholder, to choose them.”

### II.

The second sentence of proposed Finding 25, reading as follows: “During the time the property was in Bronson’s name, it was held by him as the agent and representative of plaintiff, and for plaintiff’s use and benefit, subject to its orders and directions, and the same conditions prevailed during all the time title stood in the name of Occident.”

### III.

The last sentence of proposed Finding 25, read-

ing as follows: "The paper transactions relating to the ownership of this property did not remove it from the assets of taxpayer from the date of its acquisition in 1901."

#### IV.

The second and third sentences of proposed Finding 27, providing as follows: "It was not a corporate structure which acted in any sense as an independent entity, and it was never more than an instrumentality created by plaintiff temporarily to hold title to the property for plaintiff and nothing more during its short and incomplete existence as a corporate structure. Its officers were only nominally such, since there was no one to choose them initially, after the resignation of the original incorporators."

#### V.

The underlined portion of the first sentence of proposed finding 29, reading as follows: "The only investment in money that plaintiff ever made in this property was the \$60,000 it furnished to its attorney, Bronson, for the acquisition of the property in 1901, and all that took place until formal conveyance by Occident to Plaintiff of the property, following the period of construction by plaintiff of the building, were acts of the plaintiff and not of Occident."

Plaintiff objects to all of the proposed Conclusions of Law, except number 6 thereof, providing as follows: "Plaintiff is not entitled to recover anything for the fiscal year ended November 30,

1942, for the further reason that its claim for refund for that year was not filed within the time prescribed by statute."

Respectfully submitted,  
/s/ JONES & BRONSON,  
/s/ H. B. JONES,  
/s/ A. R. KEHOE,

Counsel for Plaintiff.

Copy received this 2nd day of March, 1949.

/s/ THOMAS R. WINTER.

[Endorsed]: Filed March 3, 1949.

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[Title of District Court and Cause.]

**PLAINTIFF'S REQUEST FOR ADDITIONAL  
FINDINGS OF FACT AND CONCLUSIONS  
OF LAW**

Plaintiff requests the court to make the following additional Findings of Fact:

**I.**

As an addition to defendant's proposed Finding 8, after deletion as proposed in plaintiff's Objections, the Court should find "At the first meeting of the Board of Trustees of the Occident Trust Company, held on April 15, 1901, Ira Bronson subscribed for 1000 shares of stock of the company in the amount of \$100,000.00, this being the entire capital stock of the company. He then offered to convey Lots 1 and 2, Block 327, Seattle Tide Lands, to the company in full payment of his subscription to the stock. The Board of Trustees after stating

"Whereas, said property is of a value of upward of \$100,000.00," authorized the issuance and delivery of the stock fully paid and non-assessable, to Ira Bronson, in consideration of transfer of the lots to the company. Stockholder and Trustee meetings were held on April 18, 1902; April 17, 1903; April 15, 1904, and April 21, 1905. At the Stockholders meeting of April 15, 1904, the stockholders discussed the advisability of constructing a large brick building on the company's property. The Secretary of the Occident Trust Company was instructed to proceed with plans for the construction of a large brick building upon the company's property, which consisted of Lots 1 and 2 of Block 327, Seattle Tide Lands. The Secretary was authorized to make contracts for all material necessary, and then proceed as soon as possible with the work."

## II.

As an addition to defendant's proposed Finding 9, after deletions as proposed in plaintiff's Objections, the Court should find "Occident Trust Company entered into contracts for the construction of the building. The Contractor's bond of Donaldson Brothers, relating to the construction of the building, ran to the Occident Trust Company. The contractor's bond of H. W. Holly, ran to the Occident Trust Company. The contractor's bond of Ernest Carstens ran to the Occident Trust Company. The contractor's bond of Soderberg & Hill ran to the Occident Trust Company. Invoices of H. W. Holly, F. M. McClallam, T. E. Jones, Wash-

ington Steam Heating Co., D. E. Fryer & Company, Washington Iron Works Co., George W. Church, Soderberg & Hill, and Index Granite Works, all ran to the Occident Trust Company. Invoices of Pacific Wire and Plating Works, and J. C. Mill & Piper Company, ran to the Seattle Hardware Company, but these were changed by A. Wickersham, architect, to the Occident Trust Company.”

### III.

As an addition to defendant's proposed Finding 12, after deletions as proposed in plaintiff's Objections, the Court should find “After the conveyance by Occident to plaintiff on February 21, 1906, Occident was left without assets of any kind whatsoever.”

### IV.

The period at the end of defendant's proposed Finding 23 should be stricken and there should be added the following: “except for adjustments covered by jeopardy assessments as provided in Paragraph 5 of the Pre-Trial Order herein.”

Plaintiff requests the Court to make the following Conclusions of Law as an addition to defendant's proposed Conclusions of Law after deletions proposed in plaintiff's Objections:

### I.

The transfer of title of Lots 1 and 2, Block 327, Seattle Tide Lands, by the Occident Trust Company to Seattle Hardware Company, on February 21, 1906, was a liquidation of Occident Trust Company by its parent, Seattle Hardware Company.

The basis of Seattle Hardware Company for gain or loss and invested capital credit in the property is the fair market value of the stock of Occident Trust Company at the time of the liquidation which in turn is the fair market value of the assets of Occident Trust Company at the time of the liquidation or \$224,322.00, the agreed value of the land plus \$270,751.38, the agreed cost of the improvements, the latter being subject to adjustments, additions and depreciation.

## II.

The defendant will propose a recomputation of taxes for the fiscal years ended November 30, 1941; November 30, 1943; November 30, 1944, and November 30, 1945, in accordance with this Court's decision, giving effect therein to any adjustments of the taxes which may be proper under the provisions of law, and if such computations are agreed to by the plaintiff herein, that shall become the basis for the judgment to be entered herein. If the parties are unable to agree on said recomputations, this Court reserves jurisdiction to decide the differences in a further and final hearing to be held at this Court's convenience.

Respectfully submitted,

JONES & BRONSON,

/s/ H. B. JONES,

/s/ A. R. KEHOE.

Counsel for Plaintiff.

Copy received this 2nd day of March, 1949.  
Thomas R. Winter.

[Endorsed]: Filed March 3, 1949.

[Title of District Court and Cause.]

### FINDINGS OF FACT

1. This is an action brought under Section 24(5) of the Judicial Code, as amended, and as qualified by Section 3722 of the Internal Revenue Code, as amended, for the recovery of income and excess profits taxes for the fiscal years ended November 30, 1941, to 1945, inclusive, in the amount of \$202,681.10, plus interest.

2. Plaintiff is a corporation duly and legally organized under the laws of the State of Washington. Its articles of incorporation were filed March 17, 1885, and it has been in continuous existence since that date and during the period of its existence has been engaged in the wholesale hardware business in Seattle, Washington.

3. The defendant is now and has been since March 6, 1941, the duly appointed, qualified and acting Collector of Internal Revenue for the collection district of Washington, having his office and residing at the City of Tacoma, Washington, in the jurisdiction of this Court; that the acts done by the defendant as herein stated were done in his representative capacity and under and pursuant to the direction of the Commissioner of Internal Revenue of the United States.

4. For the fiscal years ended November 30, 1941, to November 30, 1945, inclusive, plaintiff kept its books and records and filed its income, declared value excess profits, and excess profits tax returns

on the accrual basis and on the basis of fiscal year ended November 30th.

5. This Court finds the facts as set out in Paragraphs 5, 6, 7, and 8 of the stipulation of the parties herein which relate to the dates and amounts of the payment of the taxes here involved and the filing of tax returns.

6. After its incorporation in 1885, plaintiff prospered and expanded with the rapid growth of the City of Seattle which continued during the years of its existence. In 1901, long before the dates of federal incomes taxes and before the dates when workmen's compensation laws came into existence in the State of Washington, plaintiff desired to acquire two lots adjoining the one it then owned upon which it intended to erect a building sufficiently large to meet its then needs and its needs through the future years.

7. On or about April 19, 1901, plaintiff purchased Lots Nos. 1 and 2, Block 327, Seattle Tidelands, King County, Washington, from Stetson & Post Mill Company. A deed of conveyance dated April 19, 1901, from Stetson & Post Mill to one Ira Bronson evidenced the purchase of the property desired by plaintiff. The consideration for the property was \$60,000 which was paid by the plaintiff. The deed of conveyance was dated April 19, 1901. The purchase was made by Bronson as plaintiff's agent and for the reason the plaintiff believed a better bargain could be obtained by dealing in this manner. From April 19, 1901, to October 1, 1903, Bronson

held title to this property in trust for its true owner the plaintiff. At the time of the purchase of the property Bronson was plaintiff's attorney as well as its agent.

8. On April 15, 1901, at the direction of the plaintiff, Bronson, together with two persons not identified with plaintiff in any manner, organized the Occident Trust Company as a corporation, and Bronson subscribed for the entire capital stock of this corporation as is evidenced by its articles of incorporation which were filed with the Secretary of the State two days later, April 17, 1901. On the same day that the articles of incorporation were executed by Mr. Bronson and his coinorporators, they all resigned. There were no stock certificates ever issued to Bronson by the corporation for all or any part of its capital stock, and neither money nor property passed from Mr. Bronson, nor any other person or corporation, to Occident for any of its capital stock. Occident never issued stock to anyone, as it kept no stock book. However, on the day of the execution of its articles of incorporation, following the resignation of its incorporators, M. D. Ballard, F. W. Baker, and C. H. Black, trustees and stockholders of the plaintiff, were elected to fill the vacancies of those resigned; and on April 18, 1901, at a meeting of the stockholders of Occident, M. D. Ballard was elected president; F. W. Baker, treasurer, and C. H. Black, secretary, though they were not legally chosen for these positions since there was no one representing Occident either as incorporator or as stockholder to choose them.

9. On September 1, 1903, plaintiff set up a building committee to perfect plans for the erection of a building on the lots in question, legal title to which was then in the name of Bronson, its attorney. Plaintiff employed architects and took all the essential steps for the construction of the building desired by it. It carried through all negotiations in the way of financial obligations for the construction of such building. It paid all the costs for the construction of the building; though it had been charged on its accounts to Occident. It also, during this period of time, and in the whole period of time from the original acquisition of the property until the completion and acceptance of the building, paid all of the taxes and assessments against the property; and it collected the receipts produced from certain minor rentals before the old buildings that stood upon the property were removed to make way for the new corporation. Occident kept no books of its accounts being carried on plaintiff's ledger. It maintained no offices separate from those of plaintiff and had no separate bank account. It neither declared nor paid any dividends during its corporate existence.

10. On October 1, 1903, a warranty deed, executed by Bronson and wife to Occident, for a recited consideration of \$100,000, was placed of record. There was no actual consideration whatever passing from Occident to Bronson either in money or in stock. Plaintiff then undertook the construction of its building, in accordance with its plans and specifications, under orders and directions of its building committee.

11. On September 21, 1905, it having been found that additional funds would be required to complete the construction of the building, plaintiff negotiated for a loan of \$150,000 for the purpose of securing such funds. A note and mortgage were given, the mortgage being signed by Occident and the note by Occident and plaintiff, as well as by certain members of plaintiff's board of directors as individuals. The money produced by this mortgage went into the treasury of plaintiff, and all principal and interest on account thereof was paid by plaintiff.

12. On February 21, 1906, which was a few months after the completion of the building, a deed was executed by Occident through its officers, who purported to act as such, conveying the property from Occident to plaintiff, subject to the existing mortgage of \$150,000. This conveyance was held by plaintiff until January 20, 1908, when it was filed for record. Thereafter, Occident entirely passed out of the picture, and plaintiff, which had previously paid the annual license fee of Occident, no longer made such payments, so that, in due time thereafter, under the laws of the State of Washington, Occident as a corporation was stricken from the rolls. There never was a liquidation of Occident, since it had no assets from the time it was incorporated until being stricken by the Secretary of State for failure to pay its annual license fee.

13. The purchase price of the lots in question in this last transaction, the conveyance from Occident to plaintiff, was set up in the books of plain-

tiff as being \$225,000, which represented the appreciated book value of the property from the time it was first acquired by plaintiff in 1901, to the time of the formal conveyance by Occident to plaintiff.

14. In 1919, plaintiff acquired Lot No. 3, Block 327, Seattle Tidelands, King County, Washington, for a cash payment of \$60,291.15.

15. In the fiscal year ended November 30, 1945, plaintiff sold Lots No. 1, 2 and 3, Block 327, Seattle Tidelands in King County, Washington, with improvements thereon, and certain furniture and fixtures, for the gross sales price of \$125,000, the selling expenses being \$4,584.30, and the net selling price being \$120,415.70. In its income tax return for 1945, plaintiff reported a loss on the sale of \$166,847.16.

16. The basis for loss equivalent to that used in plaintiff's 1945 tax return but stated in greater detail, is as follows:

Cost of Lots 1 and 2	\$ 60,000.00
Paving	3,922.99
Lot 3	60,291.15
Paving	1,872.03
Building cost:	\$469,569.05
Depreciation	321,224.83
	148,344.22
<hr/>	
Furniture and fixtures,	
cost	22,743.75
Depreciation:	9,911.28
	12,832.47
<hr/>	
Total	\$287,262.86

The loss was computed as follows:

Cost less depreciation	287,262.86
Selling price less expenses sale	120,415.70
Loss reported	\$166,847.16

The table below sets forth the contentions of the plaintiff and defendant herein as to the correct basis before additions, depreciation, and adjustments for determining loss on property sold by plaintiff during the fiscal year ended November 30, 1945, and for determining the equity invested capital for excess profits tax purposes under Section 718, Internal Revenue Code.

	Plaintiff		
	Per Complaint		
	Per Returns	or Claim	Defendant
Land	\$ 60,000.00	\$224,322.00	\$ 60,000.00
Bldgs.	244,000	297,502.70	244,000.00
Total	\$304,000.00	\$521,824.70	\$304,000.00

The loss on sale of land and buildings by plaintiff as allowed by the Commissioner of Internal Revenue in the determination of taxpayer's income and excess profits tax liability for the year ended November 30, 1945, was computed as follows:

Plaintiff's basis for determining loss, as set forth above	\$287,262.86
Selling price less sale expenses	\$120,415.70
Loss per return	\$166,847.16

17. The building account in the amount of \$244,000 with later additions and adjustments became

the \$469,569.05 building cost used for purposes of determining gain or loss in reporting the sale in the 1945 return. The \$244,000, with later additions, was likewise used for purposes of determining equity invested capital as it related to building costs in the returns for 1941 through 1945.

18. In its 1941 income and excess profits tax return in reporting invested capital credit, Seattle Hardware Company used the book basis of Lots 1 and 2, namely \$220,000. The return was audited by the Commissioner of Internal Revenue and an additional assessment of \$26,220.27 was made on January 8, 1945, based in part on adjusting invested capital credit by reducing equity invested capital for Lots 1 and 2 from \$220,000 to \$60,000.

19. The ultimate taxes determined and paid for 1941, 1942, 1943, 1944 and 1945 were in part on the basis of a reduction in equity invested capital for Lots 1 and 2 to \$60,000.

20. The \$60,000 cost for Lots 1 and 2 was used by plaintiff for purposes of determining gain or loss in reporting the sale in the 1945 return.

21. The fair market value as of February 21, 1906, of the land (Lots 1 and 2) was \$224,322 and of the building was \$270,751.38. Defendant does not admit that these values are correct as to any other date either before or after February 21, 1906.

22. The plaintiff herein filed claims for refund for the income and excess profits taxes herein involved all of which were timely filed except the claim

for refund for the fiscal year ended November 30, 1942, which claim for refund was barred by the statute of limitations at the time it was filed.

All of the claims for refund were transmitted by the defendant to the Commissioner of Internal Revenue. More than six months elapsed after the receipt of the claims by the defendant and the Commissioner and the bringing of this suit and at the time this suit was brought said claims had neither been officially allowed nor rejected by the Commissioner.

23. If the base figure of \$60,000 for the two lots and \$244,000 for the building are accepted as correct as used by plaintiff in its returns in determining gain or loss on the sale of the lots and building, then gain or loss on the sale of the lots and building has been correctly determined by the Commissioner.

24. In its excess profits tax returns for the fiscal year ended November 30, 1941, plaintiff used a basis of \$220,000 for Lots 1 and 2, in reporting invested capital credit. The Commissioner thereafter reduced this basis to \$60,000. Plaintiff made no objection to the Commissioner's action for several years thereafter and used the \$60,000 basis in computing its invested capital credit in its returns for the fiscal years ended November 30, 1942, to 1945, inclusive.

25. Plaintiff paid in actual money no more than the original \$60,000 which was furnished to Bronson, its attorney, when the property was purchased on its behalf. During the time the property was in Bronson's name, it was held by him as the agent

and representative of plaintiff and for plaintiff's use and benefit, subject to its orders and directions and the same condition prevailed during all the time title stood in the name of Occident. The sole purpose and object of acquiring the property in question by plaintiff was to construct a building suitable for the business being carried on by it to meet its immediate and prospective needs. The passing of title from Bronson to Occident, and the holding of such title by Occident, was to relieve plaintiff from any liability that might arise during the course of construction of the building. The paper transactions relating to the ownership of this property did not remove it from the assets of taxpayer from the date of its acquisition in 1901.

26. The controversy in the case at bar as to the basis of the property sold and as to its cost bases in determining invested capital credit relates only to Lots 1 and 2 and the building constructed thereon. There is no controversy over the basis of Lot No. 3 and the furniture and other personal property involved in the 1945 sale.

27. Occident was in fact never more than a nominal holder of the property here in question. It was not a corporate structure which acted in any sense as an independent entity; and it was never more than an instrumentality created by plaintiff temporarily to hold title to the property for plaintiff, and nothing more, during its short and incomplete existence as a corporate structure. Its officers were only nominally as such, since there was no one to

choose them initially after the resignation of the original incorporators. At no time during its existence did it have outstanding any of its capital stock, because none had ever been issued.

28. The consideration of \$225,000 recited as going from plaintiff to Occident is a fictitious one, and the property here in question, at all times following the date of its acquisition by Mr. Bronson in April, 1901, was, and continued to be, the property of plaintiff. The cost of Lots 1 and 2, Block 327, Seattle Tidelands, King County, Washington, was the original \$60,000 paid therefor through Mr. Bronson. The sum of \$244,000 represents the unadjusted cost of the building which plaintiff paid out of its own funds and which amount with later additions and adjustments made up the sum of \$469,569.05 used in plaintiff's building account, was the sum used as cost of the building in determination of gain or loss on the building.

29. The only investment in money that plaintiff ever made in this property was the \$60,000 it furnished to its attorney Bronson for the acquisition of the property in 1901, and all that took place until formal conveyance by Occident to plaintiff of the property here, following the period of construction by plaintiff of the building were acts of the plaintiff and not of Occident. This in no way added to the original cost of the property to plaintiff. In other words, looking through form and applying substance, as established by the facts, plaintiff's actual investment in the lots and building was represented

by the actual unadjusted cost of \$60,000 for the two lots and \$244,000 for the building. Therefore the figures used in making its tax returns during the years involved as adjusted by the Commissioner must be accepted as correct in determining gain or loss on the sale of the property in 1945, and in computing invested capital credits for the fiscal years ended November 30, 1941, to 1945, inclusive.

30. The following is a brief abstract of the contentions of the respective parties:

(a) The plaintiff contends that in determining invested capital credit for purposes of computing excess profits taxes for the fiscal years ended November 30, 1941, through November 30, 1945, inclusive, and in determining basis for purposes of computing gain or loss on the sale of the property in the fiscal year ended November 30, 1945, plaintiff is entitled to a basis of cost for Lots 1 and 2 of \$224,322, and a cost for improvements of \$270,751.38, subject to adjustments, additions and depreciation.

In the alternative and in the event it is held the \$224,322 and \$270,751.38 cost is not applicable, then plaintiff contends that it is entitled to the cost per the books of Lots 1 and 2, viz., \$220,000, for purposes of determining invested capital credit for the fiscal years ended November 30, 1941, through November 30, 1945, inclusive, and for purposes of determining the basis to be used in computing gain or loss on the 1945 sale.

(b) The defendant contends (1) that plaintiff acquired Lots Nos. 1 and 2 in April, 1901, at a cost

of \$60,000 before additions and improvements. That the cost to plaintiff of constructing the building before adjustments covered by jeopardy assessments hereinafter referred to, was \$244,000, and that such amounts have been properly used in plaintiff's returns and by the Commissioner of Internal Revenue in determining invested capital credit for the fiscal years ended November 30, 1941, to November 30, 1945, inclusive, and as an unadjusted basis for loss on the 1945 sale. (2) Defendant further contends that although the evidence may show that the legal title of Lots 1 and 2 on which the building was constructed was carried in the name of Ira Bronson (plaintiff's attorney) from April 19, 1901, to October 1, 1903, and in the name of Occident Trust Company from October 1, 1903, to February 21, 1906, that plaintiff was during all of said time, in substance and reality, the owner of the property, and that the said Ira Bronson and the said Occident Trust Company were in truth and reality mere agents, nominees, or instrumentalities of the plaintiff, and held the title to the said property for and on behalf of the plaintiffs and as plaintiff's agents, trustees, or nominees. Defendant consequently contends that for tax purposes it should be held that the plaintiff was in substance and reality the purchaser of the property in 1901 and as having constructed the building upon said property. Consequently the cost should be determined by what was paid for the lots and for construction of the building, rather than by the fair market

value of the land and building on the date said property was deeded to plaintiff by said Occident Trust Company.

(3) Defendant does not admit or concede that the Occident Trust Company was legally a wholly-owned subsidiary of the plaintiff, nor that there was a liquidation of said Occident Trust Company in February 1906, as contended by the plaintiff to have been carried out by a distribution of its assets in liquidation in exchange for stock. Defendant does not admit or concede that there was a liquidation of the Occident Trust Company prior to the year 1909 when the corporate existence of said Occident Trust Company was terminated for non-payment of corporate fees.

(4) Defendant further contends that under the provisions of Sections 113(a)(11), 113(a)(15), and 112(b)(6), Internal Revenue Code, no gain or loss shall be recognized where property is received by a corporation distributed in complete liquidation of another corporation, or when property is acquired during an affiliation. It is contended that under said Sections that even if plaintiff is correct as to the proper cost basis of the property, no gain or loss being recognizable under the facts in this case, plaintiff would not be entitled to a deductible loss on account of the 1945 sale or to invested capital credit for the years 1941 to 1945, inclusive, except upon the basis of the original actual amounts expended for the land and construction of the building.

5. Plaintiff's alternative contention is not covered by its claim for refund.

6. The property acquired by plaintiff on or about February 21, 1906, from Occident Trust Company was not property previously paid in for stock, as paid in surplus or as a contribution to capital within the provisions of Section 718(a)(2), Internal Revenue Code, so as to be includable in invested capital under Section 718, Internal Revenue Code, and said property did not constitute accumulated earnings and profits within Section 718(a)(4), Internal Revenue Code.

### CONCLUSIONS OF LAW

1. Occident during the time it held title to Lots 1 and 2, Block 327, Seattle Tidelands, King County, Washington, was never more than a nominal holder of the property. It was not a corporate structure that acted in any sense as an independent entity, and was never more than an instrumentality, agency or department created by the plaintiff for the purpose of temporarily holding title to the property which it did and nothing more during its short and incomplete existence as a corporate structure. Lots 1 and 2 were originally acquired by plaintiff through its agent Bronson at a cost of \$60,000, and the sum of \$60,000 represented the actual and only investment which plaintiff made in the property.

2. The building involved was constructed at a cost of \$244,000 which amount was paid out and expended by plaintiff and which represents the total investment of plaintiff aside from later additions and improvements and expenditures represented in plaintiff's building account, in said building.

3. In determining the amount of plaintiff's deductible loss if any for the fiscal year ended November 30, 1945, under the provisions of Section 23(f), Internal Revenue Code, upon the sale of Lots 1 and 2, Block 327, Seattle Tidelands, and the building later constructed thereon, the correct basis is the cost of the property which in this case is measured by the amounts paid by the plaintiff for the lots and the amounts laid out and expended for the construction of the building or \$60,000 and \$244,000, respectively.

4. Even if it be assumed as contended by plaintiff that in determining plaintiff's invested capital credit for excess profits tax purposes under Sections 714-718, Internal Revenue Code, that plaintiff is entitled to include Lots 1 and 2, Block 327, Seattle Tidelands, King County, Washington, and the building as property paid in for stock, paid in surplus, or contributions to capital under Section 718(a)(2), at the basis of cost, the invested capital credit has been correctly determined on the basis of unadjusted cost of the lots \$60,000 and of the building \$244,000.

5. The Commissioner has therefore correctly used the unadjusted basis of \$60,000 for Lots 1 and 2, and \$244,000 for the building in determining the amount of deductible loss for the fiscal year ended November 30, 1945, and the amount of property paid in to be included in invested capital under Section 718(a)(2), Internal Revenue Code, for each of the fiscal years ended November 30, 1941, to 1945, inclusive.

6. Plaintiff is not entitled to recover anything for the fiscal year ended November 30, 1942, for the further reason that its claim for refund for that year was not filed within the time prescribed by statute.

7. The taxes involved in this action have been properly assessed and collected and plaintiff has failed to establish that it has overpaid its taxes for any of the years involved.

8. Plaintiff is entitled to take nothing from this defendant in this action.

9. The costs of this action are taxed against this plaintiff.

10. In view of the findings and conclusions herein, it will be unnecessary to consider and pass upon the additional contentions of the defendant as set out in the Pre-Trial Order of this Court.

Plaintiff excepts and exceptions allowed.

/s/ CHARLES H. LEAVY,  
United States District Judge.

Entered this 11th day of April, 1949.

Copy received this 2nd day of March, 1949. A. R. Kehoe, Attorney for Plaintiff.

[Endorsed]: Filed April 11, 1949.

In the District Court of the United States for the  
Western District of Washington, Southern  
Division

No. 1059

SEATTLE HARDWARE COMPANY,

Plaintiff,

vs.

CLARK SQUIRE, Collector of Internal Revenue,  
Defendant.

### JUDGMENT ORDER

The above-entitled action having duly come on to be heard at a term of the District Court of the United States for the Western District of Washington, Southern Division, before the Honorable Charles H. Leavy, United States District Judge, and the issues of fact having been submitted by the respective parties to the court without a jury, evidence heard and briefs submitted, and the plaintiff having appeared by its attorneys Jones & Bronson, Seattle, Washington, and the defendant having appeared by J. Charles Dennis, United States Attorney, Tacoma, Washington; Thomas R. Winter, Special Assistant to Chief Counsel, Bureau of Internal Revenue, Seattle, Washington, and Homer R. Miller, Special Assistant to the Attorney General, Washington, D. C., and the court having rendered its decision and filed its opinion on the 30th day of December, 1948, and having entered its findings of fact and conclusions of law herein, and having found

for the defendant and that the plaintiff is not entitled to recover anything from the defendant upon its complaint, and directing that judgment be entered accordingly.

Now on motion of J. Charles Dennis, United States Attorney, Tacoma, Washington, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, Seattle, Washington, it is hereby

Ordered and Adjudged that the complaint of the plaintiff herein, Seattle Hardware Company, be and the same hereby is dismissed upon the merits thereof, and it is further

Ordered and Adjudged that the defendant recover of the plaintiff herein, Seattle Hardware Company, the sum of \$33.20, its costs and disbursements, taxed in said action.

Dated, Tacoma, Washington, this 11th day of April, 1949.

Plaintiff excepts and exceptions allowed.

/s/ CHARLES H. LEAVY,

United States District Judge.

[Endorsed]: Filed April 11, 1949.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice is hereby given that Seattle Hardware Company, Plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final Judgment dated April 11, 1949, and filed in the above-entitled Court on April 11, 1949.

Dated this 3rd day of May, 1949.

/s/ A. R. KEHOE,

Attorney for the Plaintiff.

Copy of the within and foregoing Notice of Appeal mailed to the United States Attorney, Tacoma, and to Thos. R. Winter, Special Attorney, Bureau of Internal Revenue, Seattle, Washington, this 10th day of May, 1949.

/s/ E. E. REDMAYNE,

Deputy Clerk.

[Endorsed]: Filed May 9, 1949.

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[Title of District Court and Cause.]

**DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL**

To: The Clerk of the Above-Entitled Court:

Plaintiff, Seattle Hardware Company, by and through its attorneys of record, Jones & Bronson, and A. R. Kehoe, Esq., hereby designates the entire record in this case to be contained in the record on appeal.

JONES & BRONSON,

By /s/ A. R. KEHOE,

Of Counsel for Plaintiff.

Copy Received this 16th day of May, 1949.

/s/ THOMAS R. WINTER,

Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

[Endorsed]: Filed May 17, 1949.

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated by and between the undersigned respective counsel for plaintiff and defendant in the above-entitled cause that all of the original exhibits admitted in evidence at the trial of this cause, to wit: plaintiff's Exhibits Nos. 1 to 9, inclusive, and defendant's Exhibits A-1 to A-5, inclusive, may be transmitted with the Transcript of the Record on Appeal to the Circuit Court of Appeals for the Ninth Circuit.

JONES & BRONSON,

By /s/ A. R. KEHOE,

Of Counsel for Plaintiff.

/s/ THOMAS R. WINTER,

Of Counsel for Defendant.

[Endorsed]: Filed May 17, 1949.

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[Title of District Court and Cause.]

### ORDER

This Matter having come on for hearing at a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 17th day of May, 1949, the Honorable Charles H. Leavy, United States District Judge presiding, upon the motion of A. R. Kehoe, Esq., of counsel for plaintiff, for an order to transmit the original exhibits admitted in evidence in the trial of this cause to the Circuit Court of Appeals with the Transcript

of the Record on Appeal herein, and it appearing that a stipulation has been entered into by and between counsel for plaintiff and Thomas R. Winter, Esq., of counsel for defendant, providing for transmittal of said original exhibits; now, therefore

It Is Hereby Ordered that the Clerk of this Court be, and he is, hereby directed to transmit to the Circuit Court of Appeals for the Ninth Circuit with the Transcript of the Record on Appeal herein, the original exhibits in this cause, to wit: plaintiff's Exhibits Nos. 1 to 9, inclusive, and defendant's Exhibits A-1 to A-5, inclusive.

/s/ CHARLES H. LEAVY,  
United States District Judge.

Presented by:

/s/ A. R. KEHOE,  
Of Counsel for Plaintiff.

O.K.

/s/ THOMAS R. WINTER.

[Editorial]: Filed May 17, 1949.

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[Title of District Court and Cause.]

#### COST BOND ON APPEAL

Know All Men by These Presents, That we, Seattle Hardware Company, a corporation, as Principal, and Saint Paul-Mercury Indemnity Company of Saint Paul, a corporation of the State of Delaware, authorized to become sole surety on bonds in the State of Washington, as Surety, are held and firmly bound unto Clark Squire, Collector of Internal Revenue, defendant above named, as Ob-

lige, in the penal sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

Dated and Sealed this 17th day of May, 1949.

Whereas, on the 11th day of April, 1949, the above entitled Court rendered and entered a judgment or decree in the above-entitled cause in favor of the above-named obligee,

And Whereas, said Seattle Hardware Company, Plaintiff, feeling aggrieved by said judgment or decree and desiring to appeal from the same to the Circuit Court of Appeals of the United States of America and perfect said appeal by this bond;

Now, Therefore, the Conditions of the Above Obligation Is Such: That if the said appellant will pay all costs and damages that may be awarded against it on said appeal or on the dismissal thereof, not exceeding Two Hundred Fifty and No/100 (\$250.00) Dollars, then this obligation shall be void; otherwise to remain in full force and virtue.

SEATTLE HARDWARE  
COMPANY,

By JONES & BRONSON and  
/s/ A. R. KEHOE.

Its Attorneys.

SAINT PAUL-MERCURY INDEMNITY  
COMPANY OF SAINT PAUL.

[Seal] By /s/ Signature Illegible.

Attorney in Fact.

[Endorsed]: Filed May 17, 1949.

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated by and between the undersigned respective counsel for plaintiff and defendant in the above-entitled cause, that the following record listed in the Clerk's Certificate to Record on Appeal, be omitted from the Record on Appeal, and that in so far as the original designation of content of Record on Appeal is inconsistent herewith, that the designation of content of Record on Appeal be amended to conform hereto: First,

The following records listed in the Clerk's Certificate on Appeal be omitted from the Record on Appeal: ~

Letter to Clerk dated 8/27/47 re filing case.

Summons and Marshal's Return thereon.

Stipulation re extension of time to answer.

Order on Stipulation.

Praecipe for subpoena.

Subpoena and Marshal's return thereon.

Memorandum Brief on Corporate Entity.

Letter dated 6/8/48 to Clerk from A. R. Kehoe.

Receipt for exhibit.

Receipt for exhibits.

Stipulations re time for filing brief.

Order extending time for Plaintiff to File Reply Brief.

Reply Brief on Corporate Entity.

Reply Brief for the Defendant.

Copy of letter from Clerk to Commerce Clearing House.

Letter to Clerk from Commerce Clearing House.

Letter to Clerk from Prentice-Hall.

Copy of letter from Clerk to Prentice-Hall.

Letter dated 3/2/49 to Clerk from A. R. Kehoe.

Notice.

It Is Further Hereby Stipulated that the Record on Appeal shall consist of the following:

Complaint.

Answer.

Pre-Trial Order.

Stipulation re facts of case.

Deposition of Roy P. Ballard.

Transcript of Proceedings.

Opinion.

Plaintiff's Objections to Defendant's Proposed Findings of Fact and Conclusions of Law.

Plaintiff's Request for Additional Findings of Fact and Conclusions of Law.

Findings of Fact and Conclusions of Law.

Judgment Order.

Notice of Appeal filed May 9, 1949.

Designation of Content of Record on Appeal.

Stipulation re exhibits.

Order re transmittal of original exhibits to U. S. Court of Appeals.

Cost Bond on Appeal.

Plaintiff's Exhibits 1 to 9, inclusive, and Defendant's Exhibits A-1 to A-5, inclusive.

JONES & BRONSON.

/s/ A. R. KEHOE,

Of Counsel for Plaintiff.

/s/ THOMAS R. WINTER,

Of Counsel for Defendant.

[Endorsed]: Filed June 1, 1949.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD  
ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11, as amended, of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure, as amended, I am transmitting herewith as the Record on Appeal in the above-entitled cause all of the stipulated original pleadings on file and of record in said cause in my office at Tacoma, Washington, as set forth below:

1. Complaint (1).
2. Answer (5).
3. Pre-Trial Order (7).
4. Stipulation re facts of case (7a).
5. Deposition of Roy P. Ballard (8a).
6. Transcript of Proceedings (9).
7. Opinion (15).
8. Plaintiff's Objections to Defendant's Proposed Findings of Fact and Conclusions of Law (16).
9. Plaintiff's Request for Additional Findings of Fact and Conclusions of Law (17).
10. Findings of Fact and Conclusions of Law (19).
11. Judgment Order (20).
12. Notice of Appeal filed May 9, 1949 (21).

13. Designation of Contents of Record on Appeal (22).
14. Stipulation re exhibits (23).
15. Order re transmittal of original exhibits to U. S. Court of Appeals (24).
16. Cost Bond on Appeal (25).
17. Stipulation filed June 1, 1949, re Record on Appeal (26).

I do further certify that as part of the Record on Appeal, I am transmitting herewith, pursuant to order of Court, the following original exhibits, offered in evidence in the trial of the above-entitled cause, to wit:

Plaintiff's Exhibits 1 to 9, inclusive, and Defendant's Exhibits A-1 to A-5, inclusive and that said exhibits and the original pleadings and papers constitute the Record on Appeal from the Judgment of the said District Court, filed on April 11, 1949, and entered in the civil docket of said cause on April 11, 1949.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington this 3rd day of June, 1949.

MILLARD P. THOMAS,  
Clerk.

[Seal]      /s/ EDGAR SCOFIELD,  
Deputy.

[Endorsed]: No. 12259. United States Court of Appeals for the Ninth Circuit. Seattle Hardware Company, Appellant, vs. Clark Squire, Collector of Internal Revenue, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed June 6, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 12259

SEATTLE HARDWARE COMPANY,

Appellant,

vs.

CLARK SQUIRE, Collector of Internal Revenue  
for the District of Washington,

Appellee.

STIPULATION DESIGNATING PARTS OF  
RECORD TO BE PRINTED

Whereas, Appellant and Appellee have stipulated as to the original pleadings that shall make up the Record on Appeal, and Whereas Appellant is making application to be relieved from printing or reproducing the original exhibits in the printed Transcript of Record, such application having been

served upon Appellee this 6th day of June, 1949,

Now, Therefore, the Appellant and Appellee appearing and acting by and through their respective attorneys of record herein, hereby designate the following to be included in the Transcript of Record to be printed:

1. Complaint (1).
2. Answer (5).
3. Pre-Trial Order (7).
4. Stipulation re facts of case (7a).
5. Deposition of Roy P. Ballard (8a).
6. Transcript of Proceedings (9).
7. Opinion (15).
8. Plaintiff's Objections to Defendant's Proposed Findings of Fact and Conclusions of Law (16).
9. Plaintiff's Request for Additional Findings of Fact and Conclusions of Law (17).
10. Findings of Fact and Conclusions of Law (19).
11. Judgment Order (20).
12. Notice of Appeal filed May 9, 1949 (21).
13. Designation of Contents of Record on Appeal (22).
14. Stipulation re exhibits (23).
15. Order re transmittal of original exhibits to U. S. Court of Appeals (24).
16. Cost Bond on Appeal (25).

17. Stipulation filed June 1, 1949, re Record on Appeal (26).

[Endorsed]: Filed June 7, 1949.

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[Title of United States Court of Appeals.]

APPLICATION BY APPELLANT TO BE RELIEVED FROM PRINTING OR REPRODUCING THE EXHIBITS

Comes Now the Appellant, and respectfully applies to and moves the above-entitled Court for an Order relieving the Appellant from printing or reproducing the exhibits in this case in the printed Transcript of Record on Appeal, and ordering that all said exhibits be considered by this Court in their original form in determining the questions involved in this appeal, without such exhibits being so printed or reproduced, and as though they were fully set forth in said printed Transcript of Record. This application is based upon the grounds that said exhibits are voluminous, that some of them are not of a printable type, that some of the others are not easily printable, that others are bundles, such as samples of billings, that the inclusion of all of the exhibits in the printed Transcript of Record would make it extraordinarily long, and that the cost would be greatly disproportionate to the convenience of having them all so included as in all probability there will be very little need to refer to most of them. This application is supported by

the Stipulation by the parties hereto filed herewith.  
JONES & BRONSON.

/s/ A. R. KEHOE,  
Of Counsel for Appellant.

and

It Is Hereby Stipulated and Agreed by and between Appellant and Appellee herein, appearing and acting by and through their said respective attorneys, that all of the exhibits introduced in evidence at the trial of the above-entitled case, may be considered in their original form by the above-entitled court in determining the questions involved in this Appeal; that for the reasons stated in said application, the said parties do not consider it necessary or practical to print or otherwise reproduce said exhibits in the printed Transcript of Record on Appeal, and the parties herein respectfully request the above-entitled Court to consider each and all of the said exhibits in their original form as though the said exhibits had been printed or otherwise reproduced in the printed Transcript of Record, and further request the above-entitled Court to make and enter an Order granting Appellant's said application.

Dated: June 6, 1949.

JONES & BRONSON.

/s/ A. R. KEHOE,  
Of Counsel for Appellant.

/s/ THOMAS R. WINTER.

By /s/ VAUGHN E. EVANS,  
Assistant U. S. Attorney,  
Of Counsel for Appellee.

## ORDER

Based on the foregoing application and the stipulation of the Appellant and Appellee on file herein,

It Is Ordered that the exhibits in the above-entitled case need not be printed or reproduced in the printed Transcript of Record on Appeal, and that all of the said exhibits shall be considered in their original form by the above-entitled Court in considering and determining the questions involved in this Appeal, just as though said exhibits were set out in the printed Record.

Dated June 7, 1949.

So Ordered:

/s/ WILLIAM DENMAN,  
Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,  
United States Circuit Judges.

Due and legal service of the foregoing Application and form of Order by receipt of a duly certified copy thereof as required by law is hereby accepted in King County, Washington, on this 6th day of June, 1949.

THOMAS R. WINTER.

By /s/ VAUGHN E. EVANS,  
Assistant U. S. Attorney.

[Endorsed]: Filed June 7, 1949. Paul P.  
O'Brien, Clerk.

